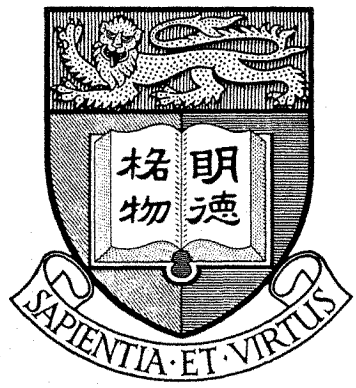
# *Conference on International Criminal Justice*

## The Origin and Development of International Criminal Law from Ancient Customary Law to the Rome Statute

**Lyal Sunga**



# *Conference on International Criminal Justice*

Jointly organized by
Faculty of Law, the University of Hong Kong
The Centre for Comparative and Public Law (CCPL), the University of Hong Kong
The Department of Justice, HKSAR

## *Programme*

**9.00-9.30 am** **Registration**

**9.30-9.35 am** **Welcoming Speech**
Professor Albert Chen, Dean, Faculty of Law, University of Hong Kong

**9.35-10.05 am** **Keynote Speech**

Judge LIU Daqun, Judge of the United Nations International Criminal Tribunal for the Former Yugoslavia (ICTY)
*"The Development of International Humanitarian Law at the Conjunction of the Centuries"*

**10.05-11.10am** **Session One: The Place of Hong Kong in International Criminal Justice**

Chairperson: Professor Roda MUSHKAT, Department of Law, University of Hong Kong

Dr. Lyal SUNGA
*"The Origin and Development of International Criminal Law from Ancient Customary Law to the Rome Statute"*

Mr. David LITTLE
*"Hong Kong SAR's Contribution to International Cooperation in Criminal Matters"*

Discussion

**11.10-11.20 pm** Coffee Break

**11.20-12.50 pm** **Session Two: Specific Issues**

Chairperson: Dr. Lyal SUNGA, Department of Law, University of Hong Kong

Mr. Simon YOUNG
*"Surrender and Transfer Implications for the HKSAR"*

Ms. Ilaria BOTTIGLIERO
*"The Role of Victims and Survivors in International Criminal Court"*

Mr. Paul HARRIS
*"Hong Kong and the ICC: The Way Forward"*

Discussion

Dr. Lyal SUNGA
*"Closing Remarks"*

# UNIVERSITY OF HONG KONG
# FACULTY OF LAW


# The Origin and Development of International Criminal Law from Ancient Customary Law to the Rome Statute

*for Participants of the Conference on International Criminal Justice*
*jointly organized by the University of Hong Kong Faculty of Law, CCPL*
*and the Department of Justice, HKSAR*
*6 March 2002*

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# The Origin and Development of International Criminal Law from Ancient International Customary Law to the Rome Statute

*for Participants of the Conference on International Criminal Justice jointly organized by the University of Hong Kong Faculty of Law, CCPL, and the Department of Justice, HKSAR*

I. Introduction

II. Early Origins and Development from Ancient Customary Law to the Nuremberg and Tokyo Trials

III. From Nuremberg and Tokyo to the ICTY and ICTR

IV. Rationale behind the ICC
- A. Why Enforce Criminal Law through International Mechanisms?
- B. Why Not Establish More Ad Hoc International Criminal Tribunals?
- C. Why Establish an ICC?

V. What is the Principle of Complementarity?

VI. Crimes Covered and Elements of Crimes
- A. Which Crimes?
- B. Why Aggression?
- C. Why Not Other Crimes, such as the Illicit Trafficking of Narcotic Drugs, Colonial Domination, Intervention, Terrorism or the Threat of Aggression?
- D. Why Do Crimes Have to Be Well Defined?
- E. A Few Other Observations on the Crimes
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VII. Outline of the Court's Structure

VIII. The Prosecutor
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- C. What Limitations are there on the Prosecutor?

IX. Trigger Mechanisms and the ICC's Relationship with the UN Security Council

X. The Trial
- A. Fair and Expeditious
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XI. Appeal and Review

XII. International Cooperation and Judicial Assistance

XIII. Penalties

XIV. Financing of the Court

XV. Amendments to the Statute

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6 March 2002

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# The Crimes within the Jurisdiction of the International Criminal Court (Part II, Articles 5–10)

## 1. PURPOSE AND PLAN OF THE PRESENT ENQUIRY

Among the main points of contention during the drafting process, both at the Preparatory Committee stage in New York and in the Rome Conference, were *which* crimes under international law should be included in the jurisdiction of the permanent International Criminal Court, *how* should they be defined, to *whom* should the rules apply (i.e. crimes committed by *whom* against *whom*?), and *when* and *where* do they apply (i.e. under *what* kinds of circumstances?).

The purpose of the present enquiry is to indicate the extent to which the crimes listed and defined in the Rome Statute reflect the established norms of international law, and if they differ, how and why.

In order to evaluate the degree of fidelity of the Rome Statute's jurisdiction *ratione materiae* to the *lex lata*, it is necessary to review Articles 5 to 10 of the Rome Statute against the backdrop of established international criminal law norms. Moreover, to understand why there may be certain discrepancies or divergences between the Rome Statute régime and general international law, it is valuable to consider a number of specific issues along the way, in particular, the crimes selected for inclusion in the Statute, the controversy over the crime of aggression, and the often heated debate that went on in the drafting process over the scope and application of provisions prohibiting crimes against humanity and war crimes.

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1. Human Rights Officer, Research and Right to Development Branch, Office of the UN High Commissioner for Human Rights, Geneva, Switzerland, is the author of The Emerging System of International Criminal Law: Developments in Codification and Implementation 1997 and Individual Responsibility in International Law for Serious Human Rights Violations 1992. Dr. Sunga represented the High Commissioner for Human Rights at the Rome Diplomatic Conference and in the Preparatory Committee meetings on the Establishment of an International Criminal Court in New York. The contribution to this volume has been made on a purely personal basis however and in no way represents the United Nations or any other office or person. My thanks to Ms. Ilaria Bottigliero for her very helpful comments on the penultimate draft.

## 2. CRIMES WITHIN THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT: ARTICLE 5

### 2.1. Why were genocide, crimes against humanity, war crimes and aggression included, but not other crimes under international law?

Article 5(1) of the Rome Statute provides that genocide, crimes against humanity, war crimes and the crime of aggression, shall come within the jurisdiction of the Court. However, it must be kept in mind that the régime to be created by the Rome Statute is narrower than that provided for by the rules of general international law pertaining to individual criminal responsibility in a number of ways.[2]

As regards the crimes envisaged to give rise to prosecution and punishment, the Rome Statute foresees a narrower range than either that reflected in general international law, or indeed, that proposed at various stages in the work of the International Law Commission (ILC)[3] which, since the General Assembly's adoption of the Nuremberg Principles[4] in 1947, has striven to codify and progressively develop international criminal law. For example, the Rome Statute does not impose individual criminal responsibility for: the threat of aggression (although possibly this may be incorporated within the Statute's definition of aggression in some form); intervention; colonial domination; the recruitment, use, financing or training of mercenaries; international terrorism; or the illicit international traffic in narcotic drugs. All these candidates for inclusion were left out of the Rome Statute, although at one stage, the ILC had proposed their inclusion in a permanent international criminal court's jurisdiction.[5] Certain among these crimes even claim a relatively high level of support from the international community at large and remain well anchored in established norms extant in treaty law, and to a lesser degree, international custom.

A small minority of Delegations seemed determined to narrow the range of crimes in the Statute as far as possible because they did not really support the establishment of the Court in the first place, but sensing it nevertheless might be set up, wished to

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2. In terms of institutional implementation, the permanent Criminal Court would be only one, albeit the most important, among a number of possible means by which to enforce individual criminal responsibility for crimes under international law. For example, the creation of *ad hoc* international criminal tribunals, such as those of Nuremberg and Tokyo, or those created to deal with perpetrators of crimes committed in the former Yugoslavia or Rwanda, remains an important option open to the international community. Domestic courts retain the authority also to prosecute crimes under international law, although actual practice shows this has been done only very rarely. *See* Bothe, McAlistair-Smith, Kurzidem (eds.), National Implementation of International Humanitarian Law 1990; Ch. Bassiouni, E. Wise, *Aut Dedere Aut Judicare*; The Duty to Extradite or Prosecute in International Law 1995; and R.D. Atkins (ed.), The Alleged Transnational Criminal: the Second Biennial International Criminal Law Seminar 1995.
3. *See generally* L.S. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (The Hague 1997).
4. General Assembly resolution 95(1), *adopted* on 11 December 1946 on Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal.
5. *See* Draft Code of Crimes against the Peace and Security of Mankind: Titles and texts of articles adopted by the Drafting Committee, UN Doc. A/CN.4/L.459/Add.1, 5 July 1991, at the ILC 43rd session, 29 April 19 July 1991. The revised version is A/CN.4/L.464/Add.4, 15 July 1991.

see it restricted as narrowly as possible so as to reduce the likelihood of its ever being called into operation.

However, at the end of the day, the vast majority of Delegations participating in the Rome Conference proved eager to see the draft treaty adopted, and accordingly, expressed more constructive proposals. Many Delegations wished to see the crimes defined with sufficient specificity, coherence and clarity, to meet the high standards of international criminal law and ensure the fundamental principles of *nullum crimen sine lege* and *nulla poena sine lege* would be fully honoured.[6] Furthermore, Delegations supporting the drive to establish the Court naturally wished the Court's jurisdiction to cover only the kinds of acts most widely recognized as crimes under international law, so as to attract the signature and ratification of as many States as possible, better to maximize the Court's universality. This concern had already been raised by many Governments when they were requested by the ILC for their comments on the 1991 version of the draft Code of Crimes against the Peace and Security of Mankind. Indeed, in response to these comments, the ILC in 1996 brought out a radically truncated version of the draft Code that stuck mainly to the core crimes, namely, genocide, crimes against humanity, war crimes and the crime of aggression, dropping all other less recognized crimes.[7]

The hesitancy of Governments to confer upon the permanent International Criminal Court jurisdiction over crimes defined in ambiguous terms explains why the 'threat of aggression', 'intervention', 'colonial domination' and 'terrorism' were not included in Article 5. The excessively vague definition of crimes increases the opportunity for abuse by Prosecutor and perpetrator alike.

While recognizing that the illicit traffic in narcotic drugs in some cases may be serious enough even to threaten the political independence of a State, some Governments continue to ponder whether such activity ought to be handled more as a matter for inter-state co-operation i.e. more bilaterally, or at most as a matter for international co-operation at the regional level, rather than as a matter for general international co-operation.[8] Militating against a more comprehensive global approach were wide divergences among the cultures, traditions and laws of various countries concerning the appropriate response to the problem of illicit trafficking in narcotic drugs, the level of punishment to be meted out for violations, and different views concerning rehabilitation of the offender.

These persistent questions did not prevent the Rome Conference from leaving open the possibility to include in the jurisdiction of the Court in future the crime of illicit trafficking in narcotic drugs, or indeed other crimes as the international community may so decide. Article 121 of the Rome Statute provides States Party to the Statute

6. According to these principles, there can be neither crime nor punishment in relation to a specific act unless the law already prohibited it prior to the time of its commission.
7. *See* Draft Code of Crimes against the Peace and Security of Mankind: Titles and Texts of Drafts Articles, *adopted by* the Drafting Committee on second reading it its 47th and 48th sessions; A/CN.4/L.522 of 31 May 1996; and Draft Report of the ILC on the Work of its 48th Session, A/CN.4./L.527/Add.10 of 16 July 1996.
8. The so-called 'treaty crimes' of terrorism, illicit trafficking in narcotic drugs, and crimes against UN and associated personnel, remained under consideration for inclusion in the Statute until the final week of the Rome Conference. *See e.g.*, Discussion Paper issued by the Bureau of the Rome Conference; A/CONF.183/C.1/L.53 of 6 July 1998.

the opportunity to propose amendments following the expiry of a period of seven years from the Statute's entry into force. Moreover, Article 124 obliges the UN Secretary-General to convene a review conference, open to an Assembly of States' Parties, to consider amendments to the Statute including *inter alia* 'the list of crimes contained in Article 5'.

Certainly, a controversial candidate for inclusion in the Statute shall continue to be the crime of aggression, which although foreseen in the Court's jurisdiction *ratione materiae* as per Article 5(1), has yet to be defined for the purposes of international criminal law.[9]

## 2.2. The Crime of Aggression: A Controversial Inclusion

Article 5 (2) provides specifically that jurisdiction over cases of aggression shall not be exercised by the Court until a provision is adopted on aggression according to the procedures set out in Articles 121 and 123. Article 5(2) further stipulates that the provision 'shall be consistent with the relevant provisions of the Charter of the United Nations'.

The decision of Delegations to the Rome Conference to include in the Court's jurisdiction the crime of aggression, subject to its being properly defined for the purpose of international criminal law enforcement, tells most of the story. Clearly, the majority of states shared the view that, in our contemporary world, to set up a permanent international criminal court with jurisdiction over crimes of far lesser magnitude, such as individual cases of war crimes or crimes against humanity, without seeking to punish belligerency writ large, would create a strange anomaly. As most abuses occur in the context of armed conflict, omitting the crime of aggression from the Statute would be tantamount in many cases to treating mere symptoms while ignoring the pathogenic cause.

However, Delegations could not agree on the precise definition for the crime of aggression, and indeed, this remains a challenging legal question. Historically, the use of force on the international plane has been more the norm rather than the exception. The last five hundred years are replete with seemingly endless examples of wars launched for the most banal of reasons – squabbles over succession, minor territorial disagreements and petty alliances. States regarded the initiation of war as their sovereign right, and it was not until the era of the League of Nations that the international community endeavoured to develop legal procedures to outlaw it.[10]

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9. *See* A.M. Rifaat, *International Aggression: A Study of the Legal Concept – Its Development and Definition in International Law* (Stockholm 1979) and Sunga *supra* note 3 at pp. 31–59.
10. *See* most notably the Paris Pact (International Treaty for the Renunciation of War as an Instrument of National Policy), also known as the Kellogg-Briand Pact, *signed* initially on 27 August 1928 by the representatives of 15 states, *entered into force* 24 July 1929, 94 L.N.T.S. 57, 46 Stat. 2343, T.S. No. 796, and *signed* by sixty-three states by the outbreak of the Second World War. *See also* Articles 11, 12, 13 and 15, of the League of Nations Covenant which obliged the parties to refer the dispute to the League of arbitration, judicial settlement or to the League Council. *See further* the procedural restrictions on the international resort to the use of force set out in Article 10 designed to delay the deployment of armed force for three months.

An important stride towards holding an individual leader criminally responsible for aggression was taken after the end of World War I with the insertion of Article 227 in the Treaty of Versailles.[11] However, it was not until the Nuremberg and Tokyo Trials that individual Axis leaders and organizers were actually prosecuted and punished for the count of 'crime against peace' – perhaps a somewhat broader concept than 'crime of aggression' – which was, at the time of the drafting of the Nuremberg and Tokyo Charters, new law.[12] Largely due to the insistence of the US representatives to the War Crimes Commission, Article 6(a) of the Nuremberg Charter as finally adopted, provides that crimes against peace 'namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances . . .' comes within the Nuremberg Tribunal's jurisdiction.[13] However, Article 6(a) did nothing to provide a clear definition as to what precisely constitutes a war of aggression or how we are to recognize it if we see it.

In fact, the ILC's efforts to create an international criminal Code and Court, begun in 1946, were suspended in 1954 over the lack of a legal definition of aggression. In 1974, following years of negotiation, the General Assembly adopted resolution 3314 spelling out a definition of aggression.[14] Unfortunately, this definition was not specifically designed to apply for the purposes of criminal prosecutions. This partly accounts for the fact that neither Statute of the two *ad hoc* International Criminal Tribunals for the Former Yugoslavia and Rwanda extends jurisdiction over the crime of aggression. Nevertheless, resolution 3314 will prove no doubt a valuable source for the Assembly of States' Parties to the Rome Statute to arrive at a workable definition of aggression amenable to fair and effective implementation.

Another source of controversy over inclusion of the crime of aggression in the Rome Statute was, and remains, the question of the Security Council role *vis-à-vis* the International Criminal Court. Chapter VII of the United Nations Charter designates the Security Council as the responsible organ to respond to cases of the threat or breach of international peace and security including, of course, a war of aggression – the most serious breach of this kind.

Any Security Council role in international criminal process raises the issue of the judicial independence of the Court from the Security Council, a political body in which

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11. Article 227 foresees the prosecution of the former Kaiser, Emperor Wilhelm II, before a special tribunal 'for a supreme offence against international morality and the sanctity of treaties'. However, the former Kaiser found safe haven in neutral Holland, which refused either to prosecute or extradite him to another state for prosecution. Although Article 227 could never be implemented, it at least symbolized in principle that even a Head of State could be prosecuted by an international tribunal for aggression.
12. Indeed, at the UN War Crimes Commission established by the Allied Powers in October 1943 to pave the way for the prosecution of Axis leaders once victory could be established, there was considerable disagreement as to whether individuals ought to be liable for prosecution only for war crimes (an already established legal category) and crimes against humanity (a new legal category) – crimes at least grounded in the ancient customary *ius in bello* – or whether to add also provisions that would make individuals responsible for planning, preparing, initiating or waging a war of aggression.
13. *See* History of the UN War Crimes Commission 1948.
14. General Assembly resolution 3314 (XXIX), GAOR 29th Session, Supp. No. 31, *adopted without a vote*, 14 December 1974.

any of the permanent Members may exercise the right of veto. Not surprisingly, at many junctures in the Rome Conference negotiations, the permanent Members expressed hesitancy to surrender any of their special Security Council powers to the permanent International Criminal Court, with the exception of the United Kingdom which, to its credit, seemed the least concerned about this prospect.[15]

Whether the Assembly of States Parties eventually will decide to follow the Nuremberg (or perhaps Tokyo) Charter approach, an alternative based on General Assembly resolution 3314, or yet another formula, shall be, no doubt, a matter of great interest for years to come.

## 3. GENOCIDE: ARTICLE 6

In the Rome Conference negotiations, the crime of genocide occasioned the least controversy and its inclusion the least resistance. The legal categories of 'war crimes' and 'crimes against humanity', as discussed below, draw from several sources and bodies of international law, and encompass quite a range of distinct crimes that differ widely in gravity and scale. International legal norms prohibiting genocide, in contrast, benefit from the fact that they derive from a single multilateral treaty – the Genocide Convention, 1948[16] – drafted by the international community with considerable care and precision for the purposes of criminal prosecution by domestic courts or an international tribunal or court.

Article 6 of the Rome Statute, replicating word for the definition part of Article II of the Genocide Convention, 1948, (found also in Articles 4 and 2 of the Statutes for the International Criminal Tribunals for the Former Yugoslavia and Rwanda, respectively) provides that:

> 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:
> a) Killing members of the group;
> b) Causing serious bodily or mental harm to members of the group;
> c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> d) Imposing measures intended to prevent births within the group;
> e) Forcibly transferring children of the group to another group.

A few delegations proposed that the Conference could perhaps improve upon the Genocide Convention definition. However, from the opening day of the Rome Conference, most delegations seemed aware of the complex task that lay ahead and

15. The majority of Delegations expressed serious reservations over the possibility of Security Council interference in the workings of the International Criminal Court. Consensus seemed to form around a middle position: the Security Council role assigned by Chapter VII of the Charter had to remain intact, but it should be kept to a minimum and strictly defined *vis-à-vis* the Court.
16. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted unanimously* 9 December 1948, *entered into force* 12 January 1951; 78 UNTS 277.

appeared to have been conscious of the need to avoid opening up controversy on issues that already claimed a high level of consensus. As a negative consequence, the weaknesses and ambiguities in the Genocide Convention definition have been carried over into the Rome Statute, except for one notable improvement.

In terms of weaknesses and ambiguities, the Article 6 definition does not clear up the perennial question 'how many persons have to be killed before it qualifies as genocide?' Some would see this omission as a major defect in terms of the level of precision required of criminal law. However, the question of numbers seems to start from the incorrect premise that there must be at least a single person killed before an act of genocide has been committed. It should be kept in mind that the legal definition of genocide cannot be equated with the use of the word 'genocide' in common parlance. The fact that the definition refers to *any one* of the less extreme acts that also count as acts of genocide, namely, causing serious bodily or mental harm, deliberately inflicting on the group conditions of life calculated to bring about its destruction, the imposition of measures intended to prevent births and the forcible transfer of children of the group to another group, makes clear enough, in legal terms, that not a single person has to die for an act of genocide to have been perpetrated. This interpretation squares also with the purpose of the Genocide Convention which is to prevent genocide from being carried out, not only to punish perpetrators once the world has stood by and watch them do it. On the other hand, one can imagine that the Judges of the International Criminal Court would exercise a healthy dose of caution when considering whether to make a finding that an act of genocide has been committed in a particular instance, given that genocide is recognized to be such a serious crime.

Debate over the definition of genocide has also ensued over what constitutes 'a national, ethnical, racial or religious group'. During the drafting of the Genocide Convention, the concern was to prevent recurrence of the extermination policies planned and executed by the Nazi German Government that targeted a specific community distinguished by relatively immutable and stable attributes. That is why the Genocide Convention does not protect political groups, and would not apply, for example, to the case of Government crackdowns on political dissident movements, unless the question of such characteristics as race, religion and ethnicity were involved.[17]

Some might question whether there is a real different between politically motivated killings perpetrated by Government agents, and killings targeting a specific national, ethnic, racial or religious group, since in both cases the individual is just as dead and the group perhaps similarly threatened. However, the international community recognizes that the systematic targeting of a group on the basis of nationality, ethnicity, race or religion, tends to carry a much stronger potential for massive violations, for the very reason that the intended victims can be singled out from the rest of the population with particular ease, on account of their relatively immutable

17. *See* J. Kunz, 'The United Nations Convention on Genocide', 43 *American Journal of International Law* (1949), 738–746; L. Leblanc, 'The Intent to Destroy Groups in the Genocide Convention: Proposed U.S. Understanding', 78 *American Journal of International Law* (1949), 369–385; N. Robinson, *The Genocide Convention: a Commentary* (New York 1960); and G.J. Andreopoulos (ed.), Genocide: 'Conceptual and Historical Dimensions' (Philadelphia 1994).

difference. Because of this special vulnerability, it is therefore warranted to provide such groups with specific protection – a concern the legal definition of genocide appropriately reflects.

Fortunately, the Rome Conference did not incorporate the contents of Article III of the Genocide Convention into the Rome Statute. Article III of the Convention broadens the range of punishable acts to include, in addition to genocide, 'conspiracy to commit genocide', 'direct and public incitement to commit genocide', 'attempts to commit genocide' and 'complicity in genocide'. The terms of Article III, combined with the rather broad definition of 'genocide' in Article II, would have considerably lowered the threshold of the Court beyond reasonable limits. For example, a plain reading of Articles II and III might lead one to the logical conclusion that the mere conspiring to cause mental harm to some members of a religious group, counts as genocide. Would this mean that planning a meeting to criticize the mind-bending activities of a religious cult would constitute an act of genocide? With the omission of Convention Article III from the Rome Statute, these kinds of frivolous issues are avoided and the Court is left with the discretion to apply Article 6 in a manner consistent with the principles and purposes of international criminal law.

On the other hand, there may be clear cases of conspiracy to commit genocide, for example, which should be dealt with by the Court. The Article 3 contents of the Genocide Convention may still be applied in one or both of two ways, notwithstanding the absence of any mention of a conspiracy in Article 5. First, these elements may be inserted into Article 9 of the Statute on Elements of Crimes, should the Assembly of States Parties so decide. Alternatively, the Court could apply Article 21(1)(b) broadly to bring in these elements through the process of adjudication.

## 4. CRIMES AGAINST HUMANITY: ARTICLE 7

Although considered one of the 'core crimes', the definition and scope of the legal category of 'crimes against humanity' became the subject of considerable debate at the Rome Conference. Unlike genocide, defined in relatively clear legal terms in a single multilateral treaty – the Genocide Convention, 1948 – 'crimes against humanity' had suffered some serious defects during its birth in the Nuremberg Charter, of which one was its unnatural attachment to its Siamese twin, the legal category of 'war crimes'.[18] Ironically, however, the delayed maturation of the legal norms prohibiting crimes against humanity allowed the international community better to clarify, expand and shape them, taking fuller account of relevant norms of contemporary general international law.

At the Rome Conference, Delegations expressed differing views as to whether norms prohibiting crimes against humanity apply only to situations of international armed

18. For an overview of the early development of the legal category of 'crimes against humanity' and its relation to 'war crimes' as incorporated in the Nuremberg Charter, *see*, L.S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (Dordrecht 1992), Chapter II (4) and (5). *See further* Ch. Bassiouni, *Crimes against Humanity in International Criminal Law* (Dordrecht 1992).

conflict, or instead, also to situations of non-international armed conflict and even to situations which qualify legally as 'peace-time'.

Delegations also took different positions on what threshold, if any, should apply to crimes against humanity before the Court could seize jurisdiction. A low threshold could mean that the Court would be flooded by an endless stream of isolated violations that posed little or no threat to international peace and security. On the other hand, a very high threshold could prevent the Court from seizing jurisdiction over cases of massive violations, even where all other jurisdictional requirements had been met. Finally, Delegations sounded some discordant notes over specifically which kinds of acts ought to figure within the legal category of 'crimes against humanity' and how they should be defined.

Article 7(1) of the Rome Statute lists the acts which come within the legal definition of 'crimes against humanity', and Article 7(2) sets out definitions of key terms to guide the Court's adjudication on any crime against humanity. The general scope of application and the issue of the threshold to be reached before the Court can seize jurisdiction with respect to crimes against humanity, are addressed in the chapeau to Article 7(1).

### 4.1. The Chapeau to Article 7(1)

Article 7(1) provides that:

> For the purposes of this Statute, 'crimes against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

and then lists: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

The phrase 'For the purposes of this Statute' disconnects, or at least dissociates, the Statute's definition of 'crimes against humanity' from other definitions of the term that have been used in the past, may currently be in use, or may be developed in future, in contexts not directly related to the operation of the International Criminal Court. This approach allows the Court to apply the term 'crimes against humanity' in ways that reflect the more contemporary expression of the will of the international community as manifested at the Rome Conference, rather than to become encumbered with either its very unclear and confused Nuremberg Charter formulation, or

its unreasonably narrow construction in the Security Council's Statute of the International Criminal Tribunal for the Former Yugoslavia.[19]

At the Rome Conference, many Delegations expressed their desire to reserve the Court's authority for the more serious kinds of cases. On the one hand, 'crimes against humanity' had to be sufficiently narrow to admit into the Court's jurisdiction only those cases that pose a threat to international peace and security, rather than to sweep in all sorts of cases left unprosecuted from national jurisdictions. On the other hand, 'crimes against humanity' had to be defined broadly enough to cover crimes committed by agents of the state against its own nationals and crimes committed outside situations of armed conflicts – which were not covered by norms on war crimes. Indeed, this was a major reason why, in 1945, the Allied Powers recognized that a separate new category of 'crimes against humanity' had to be inserted into the Nuremberg Charter to cover acts committed by the Nazi German Government against its own nationals.

As drafted, the chapeau to Article 7(1) is broad in that it omits any reference to 'armed conflict'. Some Delegations had argued consistently that the Court should not be vested with any jurisdiction over cases involving non-international armed conflict situations. However, the majority recognized that were the Court restricted to operating only with respect to international armed conflict, not only could it be prevented from acting in the great number of civil wars, which in recent decades have become far more frequent than international war, and just as bloody, but also to any situation *status mixtus* i.e. any armed conflict that manifested both international and non-international aspects. Moreover, the Court would have been assigned the unenviable task of having to decide upon its own jurisdiction according to the basic international/non-international armed conflict distinction that determines the application of international humanitarian law, but is not defined by it. Thus, the chapeau to Article 7(1) wisely avoids any specific reference to 'armed conflict' which leaves 'crimes against humanity' broad enough to apply to situations of armed conflict, situations that may qualify legally as 'peace-time' and indeed any other situation beyond or in between, subject to the other limiting conditions set out in the chapeau.

The Article 7(1) chapeau limits the application of 'crimes against humanity' in three main ways.

First, a crime against humanity is not deemed to come within the jurisdiction of the Court unless it were committed 'as part of a widespread or systematic attack'. In other words, a case of murder, to take an example, will not qualify as a crime against humanity unless it was perpetrated in the context of an attack that is 'widespread' i.e. that involves a certain number of persons or involves its commission over a wide territorial area. Alternatively, a crime against humanity may be committed if it formed part of a 'systematic' attack i.e. one that involved planning and organization.

Second, the act will not qualify as a crime against humanity unless, in addition to its being committed as part of a widespread or systematic attack, the attack was directed against a civilian population. Article 7(2)(a) provides that:

19. *See further* Sunga *supra* note 3 at pp. 159–163.

> 'Attack against any civilian population' means a course of conduct involving the multiple commission of acts referred to or against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack.

The phrase in furtherance of a state or organizational policy to commit such attack 'indicates that non-government actors are exposed to individual criminal responsibility wherever the acts they may have committed were associated either with state policy or an organizational policy' (whether a state policy or not). This formula has the considerable merit of keeping out cases not connected to situations characterized by a serious level of organized violence and which involve only spontaneous or sporadic disturbances. At the same time, as discussed above, the absence of any specific reference to 'armed conflict' relieves the Court from embroiling itself in the highly technical – and potentially politically contentious – burden of having to fit complex cases that may come before it, into theoretically neat and distinct legal categories of armed conflict.

Third, the acts must also have been committed 'with knowledge of the attack'. This raises two subsidiary issues: what level of 'knowledge of the attack' does the alleged perpetrator have to have had before his or her act may be deemed to have been perpetrated 'pursuant to or in furtherance of a State or organizational policy to commit such attack'? and as an evidentiary matter, does the Prosecutor have to prove actual knowledge on the part of the alleged offender that an attack had occurred, was occurring or was planned to occur, or something less?

One can imagine cases where the alleged offender was intimately involved with the planning or execution of an attack, and as such, should be brought before the International Criminal Court for such crime, let us say, for the murder of a civilian. Such cases might be relatively unproblematic.[20]

On the other hand, suppose an accused person of Group A, kills a civilian member of Group B, perhaps aware of a background state of hostilities in which Group A militia were attacking members of Group B. However, suppose the accused committed the murder more for motives personal (such as jealousy or revenge) rather than political. Should the accused be prosecuted by the Court? The purpose of the International Criminal Court is to enforce individual criminal responsibility for the commission of particularly serious crimes, not to substitute for domestic courts in ordinary murder cases. Thus, if the murder was committed for reasons wholly unconnected to hostilities in course, then the case should perhaps be left to the domestic courts.

However, determining motive and 'knowledge of the attack' could raise difficult issues concerning the Prosecutor's burden of proof. If ordinary murder cases are not to be prosecuted by the International Criminal Court, then the accused might have a very strong incentive, depending upon the facts, to claim that, even if he or she could be proved to have committed the murder in question, it was perpetrated for purely

20. Plans by military or paramilitary organizations to carry out a widespread or systematic attack require extensive coordination, frequently involving the use of maps, order of battle (or attack) plans, written logistical, ammunition and supply details, and telecommunicated messages. All these are susceptible to interception, being recorded and adduced as evidence.

personal motives, not pursuant to or in furtherance of any state or organizational policy and as such, does not come within the Court's jurisdiction. Indeed, the accused could disclaim any knowledge of any attack and argue that it was therefore impossible to have acted pursuant to or in furtherance of it.

The phrasing of the chapeau does not seem to require the Court to 'get inside the head' of the alleged perpetrator. 'Knowledge of the attack' must be interpreted as directing the Court to apply an objective test as to whether the alleged perpetrator 'knew or ought to have known', according to 'reasonable person' standard, whether in fact there was an attack. It would appear too high a threshold to impose upon the Prosecutor the burden of proof that the accused actually knew the act was committed pursuant to or in furtherance of a state or organizational policy to commit an attack against a civilian population. Otherwise, Article 7(1) might have been phrased along the lines of: 'when committed knowingly as part of a widespread or systematic attack'.

### 4.2. Specific Acts Prohibited as 'Crimes Against Humanity'

#### 4.2.1. *Paragraphs (a–f), (h–i) and (k)*

Paragraphs (a–f), (h–i) and (k) of Article 7(1) may be conveniently treated together as these provisions follow closely those of Article 6(c) of the Nuremberg Charter, 1945, which for the first time, provided an international law definition of 'crimes against humanity'. The Charter's Article 6(c) lists 'murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war, or persecutions on political, racial, or religious grounds'. Articles 5 and 3 of the Statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, respectively, define 'crimes against humanity' by repeating the Nuremberg and Tokyo Charter definitions, namely, murder, extermination, enslavement, deportation, but then depart slightly from the Nuremberg formula of 'persecutions on political, racial *or* religious grounds' to 'persecutions on political, racial *and* religious grounds'. The formula of the two *ad hoc* International Criminal Tribunal Statutes introduces the requirement that *all three* criteria (political, racial and religious) have to be met – a much narrower formula than that in general international law, and therefore a rather retrogressive development.

The Rome Statute follows the Nuremberg and Tokyo Charters and Former Yugoslavia and Rwanda Statutes in the crimes listed, but in paragraph (d), adds to the word 'deportation' the words 'or forcible transfer of population'. This constitutes an important refinement of the law, since 'deportation' may be interpreted by the Court to apply only to individual cases, subject to the 'widespread or systematic attack' conditions of the chapeau. However, the words 'forcible transfer of population' make amply clear that the forced relocation of a group of persons, even within the territory of a single state, qualifies as a crime against humanity within the jurisdiction of the International Criminal Court.

Similarly, in paragraph (h), the Rome Statute expands the scope of the crime of persecution beyond that expressed in the Nuremberg and Tokyo Charters and the narrower Yugoslavia and Rwanda Tribunal Statutes to:

> Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.

Paragraph (h) is probably the weakest element of the Rome Statute's definition of 'crimes against humanity' from the point of view of respect for the principles *nullum crimen sine lege, nulla poena sine lege*, for three reasons. First, paragraph (h) is cast in overly broad terms, employing the phrase 'any identifiable group or collectivity', terms much broader than those used in Article 6 of the Rome Statute, for example. Second, paragraph (h) is non-exhaustive, referring to 'other grounds that are universally recognized as impermissible under international law'. In this connection, even the term 'impermissible' is rather vague since it seems to connote more a factual, descriptive meaning as to what is or is not permitted to happen. It would have been better to have employed the term 'prohibited' – the standard normative term indicating the forbidding, banning or outlawing of a particular kinds of act. Third, the placement of 'persecution' in Article 7(1), as a substantive element of 'crimes against humanity', seems a little illogical because it refers to persecution 'in connection with any act referred to in this paragraph', i.e. it appears self-referential, and in the context, even tautological. Fortunately, the words, 'or any crime within the jurisdiction of the Court' salvages the crime of persecution by also directing the Court to relate this norm to any crime listed in Articles 6, 7 or 8, of the Rome Statute.

The problem of the placement and role of 'persecution' in the list of crimes may derive from an ambiguity basic to the legal definition of 'persecution'. If 'persecution' is to be understood more as the *way* in which violations are perpetrated (a procedural facet) and less as an independent and discrete crime under international law (a substantive norm), then the targeting of an identifiable group should simply have been incorporated as part of the chapeau to the definitions of 'crimes against humanity', and perhaps 'war crimes', not as a separate substantive element. Incidentally, this very same inconsistency appears also in Article 21 of the ILCs 1991 draft Code against the Peace and Security of Mankind.

Paragraph (f), listing 'torture' as a crime against humanity, follows the examples of the Yugoslavia and Rwanda International Criminal Tribunal Statutes, by referring simply to 'torture'. In contrast, neither the Nuremberg or Tokyo Charter mentions 'torture', but rather refer to 'ill-treatment' in the provisions on war crimes, and 'other inhumane acts' in provisions on crimes against humanity.

In Article 7(2)(e), the Rome Statute defines 'torture' to mean:

> the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

This definition of 'torture' is to be preferred over that of Article 1 of the UN Torture

Convention, 1984,[21] because the Torture Convention applies only to cases 'when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity', whereas the Rome Statute refers only to situations relating to 'a person in the custody or under the control of the accused' – a far broader provision in terms of jurisdiction *ratione personae* that relieves the Court of having to establish in particular cases before it the problematic question as to whether the accused was acting pursuant to or with the colour of official capacity.

Unfortunately however, the Rome Statute definition of torture carries over the Torture Convention's exception according to which torture does not encompass any 'pain or suffering arising only from, inherent in or incidental to, lawful sanctions', leaving States a wide scope to define away torture in their jurisdictions through domestic laws authorizing sanctions of a cruel or inhumane character. One way out of this quandary would be for the Court to determine the 'lawfulness' of the sanctions, not solely according to criteria set by the domestic law of the State in question, but also against the background of customary international human rights standards.

Interestingly, paragraph (k) referring to 'other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health' is not connected to 'torture' in paragraph (f). Particularly as paragraph (k) comes as the final paragraph of the article, rather than as part of, or even immediately following paragraph (f) on torture, this indicates the intention of the drafters to introduce into paragraph (k) a non-exhaustive aspect to the whole of Article 7(1).

'Enforced disappearance of persons' in paragraph (i) represents a welcome recognition of the severity of this phenomenon. Indeed, in 1992, the General Assembly considered that enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a 'crime against humanity' in the preamble to the Declaration on the Protection of all Persons from Enforced Disappearance.[22] The specific phenomenon of enforced disappearance did not appear within the category of 'crimes against humanity' in the Nuremberg or Tokyo Charters, the two *ad hoc* International Criminal Tribunal Statutes, or even in the codification work of the ILC.

### 4.2.2. *Paragraph (g) on Crimes of Sexual Violence*

For the most part, international criminal law norms have been unconscionably silent on crimes of sexual violence. Paragraph (g) of the Rome Statute goes a long way in rectifying this major shortcoming. Articles 5(g) and 3(g) of the Statutes for the International Criminal Tribunals for the Former Yugoslavia and Rwanda, respectively, include rape as a crime against humanity but threatened to narrow unduly the appli-

21. *Adopted by consensus* by the General Assembly 10 December 1984, *opened for signature* 4 February 1985, *entered into force* 26 June 1987.
22. General Assembly resolution 47/133, *adopted* 18 December 1992.

cation of norms prohibiting rape by subsuming 'rape' under the overly restrictive chapeaux in those Statutes. It is to be recalled that the Former Yugoslavia Statute linked 'crimes against humanity' to 'armed conflict', a connection that does not appear even in Control Council Law No. 10 of 20 December 1945, the 1954 ILC draft Code, or the definitions of genocide and apartheid in the Genocide Convention, 1948, or the Apartheid Convention, 1973,[23] respectively, which expanded the definition of 'crimes against humanity'.

Significantly, paragraph (g) is not limited to rape, but sweeps in a number of other crimes, such as sexual slavery and enforced prostitution and forced pregnancy, widely perpetrated, for example, by occupying Japanese forces during the Second World War, more recently, in the armed conflicts that took place in the former Yugoslavia and Rwanda, and in many other theatres of war that could be mentioned. By the words, 'or any other form of sexual violence of comparable gravity', paragraph (g) maintains flexibility, without leaving the door completely open, because of the words 'of similar gravity' – which direct the Court to seize jurisdiction over comparable acts on the basis of reasoning by analogy.

### 4.2.3. *Paragraph (j) on Apartheid*

The crime of apartheid does not appear in the Nuremberg or Tokyo Charter definitions of 'crimes against humanity' and in neither of the International Criminal Tribunal Statutes, since these instruments were designed to address other kinds of situations. However, apartheid has received a substantial level of international recognition as a crime against humanity, as reflected in the UN Apartheid Convention, 1973, which qualifies it as such.

The definition of the crime of apartheid in Article 7(2)(j) of the Rome Statute constitutes a major improvement over that of Article I of the Apartheid Convention, and even that of the ILCs 1991 draft Code, Article 20(2) of which had introduced greater precision. The Rome Statute's definition refers to 'an institutional régime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that régime' as the context in which any of the other acts listed in Article 7(1) as 'crimes against humanity' may come within the Court's jurisdiction, omitting the long, vague list of acts that appears in the Apartheid Convention.

23. By resolution 3068 (XXVIII) *adopted by* the General Assembly 30 November 1973, *opened for signature*, as the International Convention on the Suppression and Punishment of the Crime of Apartheid.

## 5. WAR CRIMES: ARTICLE 8

### 5.1. The Chapeau to Article 8(1)

Article 8(1) delimits the entire application of Article 8, much in the same way as do the chapeaux in Articles 6 and 7, by establishing certain threshold criteria before the Court can seize jurisdiction. Article 8(1) provides that 'The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'.

The phrase 'in particular when committed as a part of a plan or policy' implies that the Court shall assume jurisdiction only over cases involving a certain level of organization and command responsibility in fact (not necessarily related to a State). Conversely, acts that may qualify as war crimes under international humanitarian law or laws of war, may not come within the statutory definition of 'war crimes' if committed only on an isolated basis, without the sanction of any higher authority within a chain of command. While a few Delegations and some human rights NGOs at the Rome Conference had hoped for a lower threshold, the majority of Delegations expressed concern that were the Court conferred jurisdiction over all cases of war crimes, whether or not committed as part of a plan or policy, it would soon be swamped with cases arising in sundry countries, conflicts and contexts, pulled this way and that. Better to reserve to the attention and resources of the Court situations involving a genuine breach or threat of international peace and security where perhaps the Court could play a more constructive deterrent role, rather than to chase after perpetrators of less significance to conflict prevention and national reconciliation. Indeed, the requirement of a connection of the act to a plan or policy is known in international humanitarian law, in particular, Article 1(1) of Protocol II which provides that the Protocol shall apply to conflicts:

> which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized group which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

The reference in Article 8(1) to 'large-scale commission of such crimes' is disjunctive so that even if the acts in question were not committed as part of a 'plan or policy', they may still come within the Court's jurisdiction where committed on a sufficiently wide scale.

Article 8(2) spells out the acts that fall within the Statute's definition of 'war crimes' in four categories. With regard to international armed conflict, Article 8(2) covers first, Geneva grave breaches Convention and second, other serious violations. Concerning non-international of the armed conflict, Article 8(2) covers serious violations of Article 3 common to the four Geneva Conventions and second, other serious violations.

## 5.2. International Armed Conflict

### 5.2.1. *Grave Breaches of the Geneva Conventions, 1949*

Article 8(2)(a) lists grave breaches of the Geneva Conventions as 'war crimes' to be any of the following acts when committed against 'persons or property protected under the provisions of the relevant Geneva Convention': wilful killing, torture or inhuman treatment, including biological experiments; wilfully causing great suffering, or serious injury to body or health; extensive destructive and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or other protected person to serve in the forces of a hostile power; wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement; and taking of hostages. These words come from the provisions set out in Article 50 of Convention I, 51 of Convention II, 130 of Convention III, and 147 of Convention IV.

The application of the grave breaches of the Geneva Conventions to situations of international armed conflict only, is in line with the Appeals Chambers Judgement of the International Criminal Tribunal for the Former Yugoslavia in the *Tadić Case* which overruled the Trial Chambers on this point. The Majority in the Appeals Chambers held that the armed conflict in question had to have an international element before the grave breaches provisions could apply.[24]

### 5.2.2. *Other Serious Violations of the Laws and Customs Applicable in International Armed Conflict*

Article 8(2)(b) brings within the jurisdiction of the Court certain kinds of acts committed in the context of international armed conflict not already covered by Article 8(2)(a) devoted to the grave breaches provisions of the Geneva Conventions, 1949.

From the point of view of drafting, it would seem to have been preferable were the Rome Conference had come up with a consolidated set of provisions on war crimes which could have brought greater coherence to the field, rather than to follow the *lex lata* so closely. Article 8, as structured, incorporates crimes from the Geneva

24. Despite the lack of any reference to 'international armed conflict' in Article 2 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, as well as growing recognition – including that indicated by the Government of the United States submitted to the Tribunal in an *amicus curiae* brief - that the grave breaches provisions of the Geneva Conventions should be recognized to apply both to situations of international and non-international armed conflict, the Majority in the Appeals Chamber held they did not. The Majority opined that: 'The international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on state sovereignty that such mandatory universal jurisdiction represents. States Parties to the 1949 Geneva Conventions did not want to give other states jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts – at least not the mandatory universal jurisdiction involved in the grave breaches system'. *See The Prosecutor of the Tribunal* v. *Dusko Tadić*, Decision of the Appeals Chamber on the Defense Motion of the Interlocutory Appeal concerning Jurisdiction at 73 (Case No. IT-94-1-D) of 2 October 1995 at para. 80. *But see also* the Dissenting Opinion of Judge Abi-Saab on this point.

Conventions grave breaches provisions and then adds provisions fashioned from other sources. This makes the Statute's war crimes provisions on international armed conflict rather long – with 34 subparagraphs – and also increases the risk of unnecessary overlap as a single act might in some cases trigger the application of more than one provision. For example, a military air strike by one state directed against an undefended village in the territory of another state that employed the use of Agent Orange defoliants and bombs might conceivably violate subparagraphs (i), (ii), (iv), (v) and (xvii) of Article 8(2)(b) as well as subparagraphs (iii) and (iv) of Article 8(2)(a). Although multiple-count indictments are not at all uncommon, the experience of the two *ad hoc* Tribunals indicates that the Prosecution may resort to 'throwing the book' at the accused i.e. indicting the accused under counts that look even remotely connected to the act in question, with the hope that one or more charge will stick. Such tactic may diminish the capacity of the accused to launch an effective defence and invite confused interpretation from the Bench as well. Secondly, less economic formulations are frequently less comprehensible to commanders and soldiers alike – a factor that may hinder general compliance on the part of even the most co-operative of States Parties to the Statute.

On the other hand, the Statute's war crimes provisions were naturally more sensitive for Governments, particularly Departments of Defense, than were provisions on genocide and crimes against humanity, since war crimes concern in particular the kinds of acts committed by members of the armed forces. By sticking closely to the traditional conventional sources, Delegations to the Rome Conference and Capitols could reassure themselves that the draft Statute provisions on war crimes did not stray beyond the relevant *lex lata*. Moreover, by adding 'other serious violations of the laws and customs applicable in international armed conflict', the Statute's war crimes provisions could be brought more up-to-date by drawing upon provisions set out in Protocols I and II which supplement the Geneva Conventions.

Turning to the specific provisions of Article 8(2)(b), it is valuable to recall that the Hague Conventions and Regulations of 1899 and 1907 were adopted to 'revise the laws and general customs of war . . . for the purpose of modifying their severity as far as possible'. Moreover, Protocol I not only supplements the four Geneva Conventions, 1949, but to a significant degree, effects a convergence between Geneva Law and The Hague Law, i.e. between international humanitarian law and the laws and customs of war. Thus, in drawing primarily from provisions set out in Protocol I, Article 8(2)(b) covers much of the classic laws and customs of war, and therefore, its chapeau aptly refers to 'other serious violations of the laws and customs applicable in international armed conflict'.

Subparagraphs (i), (ii), (v) and (vi), derive from the provisions of Article 85(3) of Protocol I; subparagraph (iii), the Convention on the Safety of United Nations and Associated Personnel, 1995;[25] subparagraph (iv), Articles 35(3) and 55 of Protocol I; subparagraph (vii), Article 38(2) of Protocol I; subparagraphs (viii–ix), Article 85(4)

25. Convention on the Safety of United Nations and Associated Personnel, *adopted unanimously*, 17 February 1995; A/RES/49/59.

of Protocol I;[26] subparagraph (x), Articles 11(1) and 11(2) of Protocol I; subparagraph (xi), Article 23(b) of the Hague Convention No. IV Regulations; subparagraph (xii), Article 40 of Protocol I and Article 23 (d) of the Hague Convention No. IV Regulations; subparagraph (xiii), Article 53 of Geneva Convention IV and Articles 23(g) and 46 of the Hague Convention No. IV Regulations; subparagraph (xiv), Article 23(h) of the Hague Convention No. IV Regulations; subparagraph (xv), Article 51 of Geneva Convention IV; subparagraph (xvi), Article 33 of Geneva Convention IV and Articles 28 and 47 of the Hague Convention No. IV Regulations; subparagraph (xvii), Article 23(a) of the Hague Convention No. IV Regulations; subparagraph (xviii), the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare;[27] subparagraph (xix), the Declaration concerning Expanding Bullets;[28] subparagraph (xx), Article 35(2) of Protocol I and Article 23(e) of the Hague Convention No. IV Regulations; subparagraph (xxi), Article 75(2)(b) of Protocol I; subparagraph (xxii), Article 76(1) of Protocol I; subparagraph (xxiii), Article 51(7) of Protocol I; subparagraph (xxiv), Article 12(1) of Protocol I; subparagraph (xxv), Article 54(1) of Protocol I; and subparagraph (xxvi), Article 77(2) of Protocol I.

Article 8(2)(b) leave out some elements of Protocol I. For example, Article 85(4)(b) of Protocol I concerning an unjustifiable delay in the repatriation of prisoners of war or civilians does not count as a war crime in the Rome Statute. The provision in Article 85(4)(c) of Protocol I concerning 'practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity based on racial discrimination' is not reflected anywhere in Article 8, but figures in Article 7(2)(h) as a crime against humanity. The Protocol I guarantee in Article 85(4)(e) of the right to fair and regular trial, does not figure in the Statute's paragraph 8(2)(b), but is already covered in paragraph 8(a)(vi). The norms provided for in Articles I, II and III of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques[29] are not reflected in the Rome Statute, except perhaps indirectly in Article 8(2)(b)(iv).

As for prohibited weapons, it is remarkable that the Rome Conference included in the Statute's definition of 'war crimes' the use of poison, poisoned weapons, asphyxiating or poisonous gases as well as expanding or flattening bullets, but could not agree to the inclusion of nuclear weapons,[30] non-detectable fragmentation weapons,[31]

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26. Subparagraph (ix) also draws upon the Convention for the Protection of Cultural Property in the Event of Armed Conflict, *adopted* in The Hague, 14 May 1954.
27. *Adopted* in Geneva, 17 June 1925.
28. *Adopted* in The Hague, 29 July 1899.
29. *Adopted* by the UN General Assembly as resolution 31/72 of 10 December 1976.
30. *See* Legality of the Threat or Use of Nuclear Weapons, General List No. 95 (ICJ Advisory Opinion) of 8 July 1996, in which the Majority ruled that the threat or use the nuclear weapons is prohibited in international law, except possibly in an extreme case of self-defense in which the survival of the State is at stake.
31. *See* Protocol on Non-Detectable Fragments (Protocol I to the Geneva Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects), *adopted* in Geneva, 10 October 1980.

landmines,[32] incendiary weapons,[33] or blinding laser weapons.[34] Subparagraph (xx) is, however, phrased in a general way, referring to the employment of:

> weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provides that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123

leaving open the opportunity to an Assembly of State Parties to the Statute to consider additions to the list of prohibited means and methods of warfare as they may evolve over time.

The majority of Delegations were firmly behind inserting in the Statute the prohibition of the use of nuclear weapons, but deferred to the equally firm opposition of the nuclear powers – States whose positions could not be ignored.[35]

## 5.3. Non-international Armed Conflict

### 5.3.1. *Serious Violations of Article 3 Common to the Four Geneva Conventions, 1949*

Article 8(2)(c) incorporates the contents of Article 3 common to the four Geneva Conventions with some minor changes. First, it applies only to serious violations, affording the Court the discretion not to seize jurisdiction over mere technical infractions of common Article 3. Second, the chapeau of Article 8(2)(c) drops the common Article 3 phrase 'without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria', which in any case still operates,

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32. *See* Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II to the Geneva Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects), *adopted* in Geneva, 10 October 1980; and Convention on the Prohibition of the Use, Production, Transfer and Stockpiling of Anti-Personnel Landmines and on Their Destruction, *adopted* in Oslo, 18 September 1997.
33. *See* Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the Geneva Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects), *adopted* in Geneva, 10 October 1980.
34. On 13 October 1995, the Vienna Review Conference of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects *adopted* pursuant to Article 8.3(b) of the Convention an additional Protocol entitled 'Protocol on Blinding Laser Weapons (Protocol IV)'.
35. India, in spite of its Government's testing of nuclear weapons on 11 and 13 May 1998 and its official declarations that it was henceforward to be considered a member of the nuclear club, pushed strongly for the inclusion of the use of nuclear weapons in Article 8 of the Statute. Delegates and Observers could only speculate on India's motives for having taken such an apparently paradoxical position.

thanks to the more comprehensive non-discriminatory clause proposed by the Canadian Delegation during the final session of the March–April 1998 Preparatory Committee, adopted as Article 21(3) of the Statute,[36] which governs the Court's application of law in general.

In common Article 3, the prohibition of hostage-taking follows directly after 'violence to life and person . . . and torture', and then is listed 'outrages upon personal dignity, in particular, humiliating and degrading treatment'. The Statute reverses the order of paragraphs (b) and (c) as they appear in common Article 3 for better coherence. The Statute incorporates word-for-word the contents of subparagraph (d) of common Article 3(1), but drops the phrase 'by civilized peoples' – a residue of old colonialist attitudes. Of course, the parts of common Article 3 pertaining to its implementation within the context of the rest of the Geneva Conventions have been left out of the Statute since they bear no direct relation to the purposes of international criminal law. Finally, the Statute's Article 8(2)(d) incorporates the limiting condition set out in Article 1(2) of Protocol II, that excepts from the Court's jurisdiction 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'.

### 5.3.2. *Other Serious Violations of the Laws and Customs Applicable in Non-International Armed Conflict*

Subparagraphs 8(2)(e)(i–vii) correspond to Article 8(2)(b) subparagraphs (i), (xxiv), (iii), (ix), (xvi), (xxii) and (xxvi) respectively. However, paragraph (e) adds, in paragraph (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand. Subparagraphs 8(2)(e)(ix–xii) correspond to Article 8(2)(b) subparagraphs (xi), (xii), (x) and (xiii) respectively. Subparagraphs (ii), (iv), (v), (vi), (vii), (viii), (xiv), (xv), (xvii), (xviii), (xix), (xx), (xxi), (xxiii), (xxiv) and (xxv) of Article 8(2)(b) were not incorporated into Article 8(2)(e). Article 8(2)(f) employs the limiting condition that appears in Article 1(2) of Protocol II.

Article 8(3) provides that:

> Nothing in paragraphs 2(c) and 2(d) shall affect the responsibility of a Government to maintain or establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

The presence of paragraphs 2(c) and 2(d) in the Rome Statute represents the willingness of the vast majority of states to recognize international criminal responsibility for certain kinds of acts even in cases of armed conflict situations occurring within their own sovereign territories. Read together with Article 8(3), it seems delegations

36. Article 21(3) reads: 'The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, as defined in Article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.'

managed to strike a nice balance by reaffirming the responsibility, and indeed the right, of the Government to exercise force at home in the interests of its national security, political independence and territorial integrity.

## 6. ELEMENTS OF CRIMES: ARTICLE 9

A number of Delegations, particularly those of certain common law countries, including that of the United Kingdom, proposed that there should be in the Statute a provision clarifying the elements of the various crimes coming within the jurisdiction of the Court. Leaving the Court without sufficient guidance from the Statute to interpret the crimes listed therein was felt by some delegations even to violate the principles of *nullum crimen sine lege, nulla poena sine lege.*

As discussed above, difficult issues may arise, such as whether a person accused of having committed a crime against humanity had to have known that the act he or she committed formed part of an attack, or merely, that there was an attack in progress. Either way, the Statute is silent on what level of knowledge of surrounding events, if any, would be necessary to fulfill the required criminal intent. Similarly, the crime of genocide places substantial emphasis on the *mens rea* of the accused, even to the extent that possibly not a single person has to have been killed before an act of genocide has taken place, an argument raised above.

At the Rome Conference, many Delegations expressed doubts as to whether a provision in the Statute spelling out specific elements of crimes was really necessary. They felt generally that the definitions of crimes were sufficiently clear as drafted and that arriving at such a provision could delay the entry into force of the Statute. However, out of deference to those delegations which insisted upon its insertion, the Conference agreed to adopt Article 9 setting up a procedure by which a provision on the elements of crimes can be adopted by a two-thirds majority of the Assembly of States Parties.

## 7. THE RELATION BETWEEN THE ROME STATUTE'S DEFINITION OF CRIMES AND GENERAL INTERNATIONAL CRIMINAL LAW: ARTICLE 10

Article 10 of the Statute provides that: 'Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute'.

Article 10 is intended to ensure that general international law remains undisturbed by the Statute. In this respect, Article 10 leaves whatever *ad hoc* international criminal tribunals as may exist, such as those for the former Yugoslavia and Rwanda, or those that may be created in future, explicit freedom – absent any other applicable norms such as may arise from their own statutes on this point – not to consider themselves bound by the Rome Statute.

However, if and when the Statute were to enter into force, the International Criminal Court would almost certainly be the principal institution for the enforcement of inter-

national criminal law and justice. Naturally, notwithstanding the words of Article 10, the mere fact that the Statute incorporates in its list of crimes, some categories of acts and not others, will likely mean that those left out, if not enforced by other mechanisms, may be marginalized, and eventually fade away.

The Rome Conference was not merely a forum in which states took positions and then voted on a draft document to create the Statute for the International Criminal Court. It was a process in which representatives of Governments of almost all the world's states concentrated their individual energies and efforts to understand the pitfalls of international criminal law and the promise of a permanent International criminal court, from each of their unique points of view. More significantly, the Rome Conference was a process in which states could explore what interests and concerns they shared as regards the threat and reality of international crime, and how, through international cooperation and good faith, they could come to common understandings and common solutions. Thanks to the vision and political will of the great majority of Delegations, the Rome Conference succeeded in the creation of a solid platform upon which to build the centrepiece for a fair and effective system of international criminal law and justice – the International Criminal Court.

# *Conference on International Criminal Justice*

## The HKSAR and International Cooperation in Criminal Matters

**David Little**

# The HKSAR and International Cooperation in Criminal Matters

(6 March 2002)

## 1. Terminology

"*International crime*" – See e.g. Article 1 of Hague Convention for the Suppression of Unlawful Seizure of Aircraft :

> "*Any person who on board an aircraft in flight:*
> *(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or*
> *(b) is an accomplice of a person who performs or attempts to perform any such act*
> *commits an offence (hereinafter referred to as "the offence").*

"*Transnational crime*" defined in Article 3(2) of UN Convention against Transnational Organized Crime as an offence committed –

*(a) in more than one State;*
*(b) in one State, but substantially prepared/ planned in another;*
*(c) in one State, but involving organized group engaged in crime in more than one State;*
*(d) in one State, but with substantial effects in another.*

"*International cooperation*" / "*mutual legal assistance*".
(Note Article 10 of the above Hague Convention – "*Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings .....*").

## 2. HKSAR's legal infrastructure

*Ordinances*
- Fugitive Offenders Ord. (Cap.503)
- Transfer of Sentenced Persons Ord. (Cap.513)
- Mutual Legal Assistance in Criminal Matters Ord. (Cap.525)
- Evidence Ord. (Cap.8)
- Drug Trafficking (Recovery of Proceeds) Ord. (Cap.405)
- Organized and Serious Crimes Ord. (Cap.455)

*International arrangements*
- Treaties applied to HKSAR (e.g. the above Hague Convention and others on aviation security;

International Convention against the Taking of Hostages, etc. See also Annex 2 of *Information Note* on HKSAR and External Affairs, section 3)

Bilateral Agreements for
(a) Surrender of Fugitive Offenders
(b) Mutual Legal Assistance in Criminal Matters
(c) Transfer of Sentenced Persons

*Institutions*
- MLA Unit of Dept. of Justice
- Courts
- HK Police (Interpol)

3. **Statistics**

*Bilateral agreements* – approximately 45 have been negotiated, of which the following have been signed–

12 MLA
13 SFO
7 TSP

(See Annex 1 of *Information Note* on HKSAR and External Affairs)

*New requests* to MLA Unit in 2001 (incoming and outgoing) – 129, of which the single biggest group was
73 MLA requests from abroad

4. **Litigation**

Requests for surrender of fugitives are far fewer than MLA requests, but more keenly litigated.

5. **Terrorism**

UN Security Council Resolutions under Chapter VII of UN Charter – new Bill to be introduced
Financial Action Task Force
ICAO

# *Conference on International Criminal Justice*

## Surrender and Transfer Implications for the HKSAR

**Simon Young**

# THE BRITISH YEAR BOOK OF INTERNATIONAL LAW

## 2000

SEVENTY-FIRST YEAR OF ISSUE

OXFORD
AT THE CLARENDON PRESS
2001

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# SURRENDERING THE ACCUSED TO THE INTERNATIONAL CRIMINAL COURT

*By* SIMON N. M. YOUNG[1]

## I. INTRODUCTION

Under the Rome Statute of the International Criminal Court,[2] the surrender of the accused is a *sine qua non* to prosecution, there being no provision for trial *in absentia*. Without its own independent police force, the International Criminal Court must rely on the cooperation of States Parties to arrest and surrender individuals. The ability of the ICC to obtain custody of accused persons is directly related to the scope of legitimate State objections to surrender. Once the Statute comes into force and the ICC is established,[3] two kinds of impediments to surrender are likely to be contentious. First, by application of the Statute's procedural mechanism for distributing prosecutions between national courts and the international forum, States Parties may object to the admissibility of a case before the ICC. Secondly, they may object on the substantive ground that surrender is prohibited by their constitution or law, e.g. on the basis that nationals may not be extradited.

Perhaps the most controversial topic during negotiations on the Statute was the ICC's jurisdiction and the mechanism for distributing national and international prosecutions.[4] Ultimately it was decided that the Court should have a broad compulsory jurisdiction over war crimes

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[2] Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9*, and corrections in CN.577.1998 TREATIES–8 (Annex) and CN.357.1999 TREATIES–14 (Annex), *reprinted in* 37 ILM 999 (1998) [hereinafter Statute]. The Statute was adopted at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome, Italy from 15 June to 17 July, 1998. It was adopted in an unrecorded vote by 120 countries in favour, 7 against and 21 abstaining. It is reported that the United States, China, Libya, Iraq, Israel, Qatar, and Yemen voted against adoption. See Dominic McGoldrick, *The Permanent International Criminal Court: an end to the culture of impunity?*, 1999 *Crim. L. Rev.* 627, 627–8. NB: All references to article and rule numbers in this article are to the Statute and the Rules of Evidence and Procedure, *infra* n. 8, unless otherwise indicated.

[3] As of 27 May 2001, the Statute has been signed by 139 countries and ratified by 32. It comes into force following ratification by 60 States (art. 126).

[4] See generally Danesh Sarooshi, *The Statute of the International Criminal Court*, 48 *Int'l & Comp. LQ*, 387, 395 (1999); Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 *Am. J. Int'l L.* 22, 25 (1999); John T. Holmes, *The Principle of Complementarity*, in *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results*, 41, 43

and crimes against humanity, tempered by a deferential distribution mechanism that makes the Court complementary to national courts. Under this principle of complementarity, national courts have the primary responsibility for prosecuting all offences. But if States are either unwilling or unable to prosecute, the ICC may rule a case admissible and require the surrender of the accused. One of the shortcomings of the Statute is the failure to specify how the burden of proof is allocated in admissibility proceedings. Given that States are likely to be in the best position to offer evidence on this point, one might suppose that they should have the burden to demonstrate the *bona fides* of their domestic prosecution. However, many writers have tended to assume that the Prosecutor will have the burden to prove admissibility simply because of the perceived 'primacy' of national courts.[5] Without giving the Prosecutor adequate resources to inquire into the propriety of domestic prosecutions, this approach may impair the effective operation of the Court.

The substantive problem of domestic law objections to surrender cannot be dismissed simply on the basis of the orthodox position that international law trumps national law.[6] The Statute itself considers the processing of arrest and surrender requests as essentially a matter of national law. It also reflects a reluctance to interfere with existing treaty regimes, such as extradition treaties, and to affect the rights and interests of non-States Parties. But at what point will this sensitivity to a State Party's national law and international obligations give way to a finding that the Party is in breach of its obligations under the Statute? How are the legitimate interests of States Parties to be reconciled with the effective operation of the ICC? The Statute fails to address these issues in a clear manner.

This article will suggest answers to these two issues on the basis of treaty interpretation. In Part II, an interpretive framework will be established, emphasizing the object and purpose of the Statute. It will be argued that the twin principles of effective prosecution and complementarity inform the Statute's text and can help clarify interpretive problems. In Part III, the interpretive framework will be applied to the

(Roy S. Lee, (ed.), 1999) [hereinafter *Making of the Rome Statute*]; Elizabeth Wilmshurst, *Jurisdiction of the Court*, in *Making of the Rome Statute*, id. 127.

[5] See Louise Arbour and Morten Bergsmo, *Conspicuous Aspects of Jurisdictional Overreach*, in *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* 129, 130–1 (Herman A. M. von Hebel *et al.* (eds.), 1999) [hereinafter *Reflections on the ICC*]; McGoldrick, *supra* n. 2 at 643; Holmes, ibid. at 73, 77; Marten Zwanenburg, *The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?*, 10 *Eur. J. Int'l L.* 124, 131–2 (1999). But cf. Jeffrey L. Bleich, *Complementarity*, 25 *Denv. J. Int'l L. & Pol'y* 281, 287–8, 291 (1997).

[6] The orthodox position has been expressed in various sources. See generally art. 27 of the Vienna Convention on the Law of Treaties, *infra* note 7; Treatment of Polish Nationals in Danzig Case, 1932 PCIJ (ser. A/B) No. 44, 24 (4 Feb.); *Prosecutor* v. *Blaskic* (Subpoena), *infra* n. 10 at 718; *Draft Articles on State Responsibility Provisionally Adopted by the Drafting Committee of the International Law Commission*, UN Doc. A/CN.4/L.569, 12, art. 42(4) (4 Aug. 1998).

problem of burden of proof in admissibility challenges. It will be argued that there are two types of admissibility challenges which operate in tandem, giving rise in effect to a dialogue between the ICC and States over the venue of prosecution. In a preliminary ruling challenge, the Prosecutor should carry the persuasive burden of showing admissibility, while States would have a duty to produce evidence on the conditions of their own domestic prosecution. In a general challenge under article 19, States should have both the persuasive burden and evidentiary duty. In Part IV, the interpretive framework is applied to the problem of national law objections to surrender. It will be argued that the Statute permits domestic courts a very narrow sphere of authority in the processing of arrest and surrender requests. It does not permit States to evade their surrender obligations by relying on the traditional extradition-based grounds of refusal, such as nationality, the political offence doctrine, and double criminality.

## II. An Interpretive Framework for the Statute

The framework of interpretation used in this article is essentially that set out in Part III of the Vienna Convention on the Law of Treaties.[7] The answers to the issues of burden allocation in admissibility challenges and national law objections to surrender do not readily emerge from the ordinary meaning of the treaty text or from the Statute's preparatory work. The Rules of Procedure and Evidence are also of limited assistance in clarifying these issues.[8] Consequently, an approach that emphasizes the object and purpose of the Statute is applied.[9] This approach is not

[7] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 [hereinafter VCLT]. Art. 31 of the VCLT provides that, '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Recourse may be made to the preparatory work of the treaty in order to confirm the meaning resulting from the application of the general rule or to determine the meaning when the general rule of interpretation leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable (art. 32 of VCLT).

[8] On 30 June, 2000, the Preparatory Commission for the International Criminal Court adopted its report containing the finalized draft texts of the Rules of Procedure and Evidence, UN Doc. PCNICC/2000/1 and Add.1 [hereinafter Rules]. See also *Proceedings of the Preparatory Commission at its fifth session (12–30 June 2000)*, UN Doc. PCNICC/2000/L.3/Rev.1. Pursuant to art. 51(1), the Rules enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties, a body which is to be established upon entry into force of the Statute. Article 5(5) provides that in the event of a conflict between the Statute and the Rules, the Statute shall prevail.

[9] On the teleological approach to treaty interpretation, see generally Ian Brownlie, *Principles of Public International Law*, 637–9, 687–9 (5th edn. 1998); Gerald G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 *Brit. YB Int'l L.* 1, 7–8, 18–20 (1951); Gerald G. Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951–4: Treaty Interpretation and Other Treaty Points*, 33 *Brit. YB Int'l L.* 203, 207–8, 210, 220–3 (1957); Edward Gordon, *The World Court and the Interpretation of Constitutive Treaties*, 59 *Am. J. Int'l L.* 794, 815–21 (1965); Hugh Thirlway, *The Law and Procedure of the International Court of Justice, 1960–1989*, 62 *Brit. YB Int'l L.* 1, 44–8 (1991). See also Case Concerning Application of the Genocide Convention (*Bosnia* v. *Yugoslavia*), 1996 ICJ 4, paras. 31–4 (11 July).

entirely teleological as it keeps within the confines of the ordinary language of the text. There is precedent for this approach from international tribunals interpreting their own constitutive instruments.[10] The Statute is clearly a law-making instrument with the characteristics of a criminal statute, a due process code, an extradition, and a mutual legal assistance treaty combined. Given the ambitious enterprise of the Statute and the considerable elements of political compromise among States with diverse criminal justice systems, interpretive problems are bound to emerge. The proposed interpretive framework can assist in addressing these problems and ensuring consistent interpretations in line with the basic tenets of the Statute.

The two central underlying purposes of the Statute are complementarity and the effective prosecution of the most serious international crimes. These principles are expressly contained in the preamble of the Statute and in the preambles of all its previous drafts since 1994.[11] To understand the specific meaning of these principles, it is necessary to consider them in light of the text and drafting history of the Statute.

### 1. *The Principle of Effective Prosecution*

During the drafting process, the most substantial discussion of the desirability of having an international criminal court was in 1992–3.[12] The general consensus in the International Law Commission was that such a court was desirable given the historical cases of impunity for the

[10] The International Court of Justice has on a number of occasions recognized implied powers of United Nations bodies on the basis of the purposes and functions of those bodies. See Reparation for Injuries Suffered in the Service of the United Nations, 1949 ICJ 174, 180 (11 April); Certain Expenses of the United Nations, 1962 ICJ 151 (20 July); Competence of the General Assembly for the Admission of a State to the United Nations, 1950 ICJ 4, 8–9 (3 Mar.); Namibia Case, 1971 ICJ 16, 30–2 (21 June). The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has also applied this method of interpretation in construing the ICTY Statute, although not strictly a treaty. See *Prosecutor* v. *Tadic* (Jurisdiction), 35 ILM 32, 55–8 (1995); *Prosecutor* v. *Blaskic* (Subpoena), 110 ILR 607, 694–6, 714 (1997).

[11] Paragraph 4 of the Statute's preamble provides that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'. Paragraph 10 of the preamble and art. 1 emphasize that the ICC shall be complementary to national criminal jurisdictions. These statements can be traced to similar ones in the International Law Commission's 1994 Draft Statute for an International Criminal Court, which along with commentary can be found in *Report of the International Law Commission on the work of its forty-sixth session*, 2 May–22 July 1994, UN GAOR, 49th Sess., Supp. No. 10, at 43–161, UN Doc. A/49/10 (1994) [hereinafter ILC Draft Statute].

[12] See *Report of the International Law Commission on the work of its forty-fourth session*, UN GAOR, 47th Sess., Supp. No. 10, UN Doc. A/47/10 (1992), para. 29–32; *Report of the Working Group on the Question of an International Criminal Jurisdiction*, Annex to ibid., para. 21, 25–43 [hereinafter 1992 Working Group Report]; *Topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-seventh session*, UN Doc. A/CN.4/446 (1993), para. 11–30.

most serious crimes of international concern.[13] It was felt that an international criminal court was needed to 'enhance the effective suppression and prosecution of crimes of international concern'.[14] This overriding purpose of effective prosecution was carried into and implemented in the Rome Statute.

The principle of effective prosecution requires that conditions exist to contribute to a reliable outcome at trial.[15] For example, one condition that is generally recognized as being essential is the impartiality of the judges.[16] The ICC, like many domestic systems, goes further by requiring strict impartiality and fairness from the prosecutors as well.[17] Another significant factor is a speedy trial.[18] As one court has aptly stated,

> [w]hen a trial takes place without unreasonable delay, with all witnesses available and memories fresh, it is far more certain that the guilty parties who committed the crimes will be convicted and punished and those that did not, will be acquitted and vindicated.[19]

A reliable verdict will depend on the extent to which the court receives all the evidence relevant to the issues in the case. This in turn depends on the ability of the Prosecutor and accused to gather this evidence. Under the Statute, the Prosecutor and even the accused depend on the cooperation of States Parties to provide assistance in evidence gathering.[20]

[13] See 1992 Working Group Report, *id.* at para. 39. For an historical account of the failure of prosecution through national jurisdictions, see Antonio Cassese, *On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 *Eur. J.Int'l L.* 2 (1998); M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 *Harv. Hum. Rts. J.* 11 (1997).

[14] Paragraph 1 of preamble to ILC Draft Statute, *supra* note 11.

[15] On the truth-determining function of the Court and Prosecutor, see arts. 54(1)(a) & 69(3).

[16] See arts. 36(3)(a), 36(7), 40(2), 41(2)(a), 45–7, 70.

[17] See arts. 42(1), 42, 45–7, 70.

[18] The Statute contains a number of provisions aimed at minimizing delay. For example, upon receipt of a request for arrest and surrender, States Parties shall 'immediately' take steps to arrest the person in question (art. 59(1)). Once ordered to be surrendered or if the person consents to the surrender, he or she shall be delivered to the Court 'as soon as possible' (arts. 59(7) & 92(3)). Accused are not to be detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor (art. 60(4)). The Trial Chamber must ensure that a trial is 'fair and expeditious' at all times (arts. 64(2) & (3)). When a unique investigative opportunity presents itself, the Court may authorize measures necessary to 'ensure the efficiency and integrity of the proceedings' (art. 56(1)(b)). If a request for assistance under Part 9 is denied, the requested State Party shall 'promptly' inform the Court of the reasons for such denial (art. 93(6)). States that accept the jurisdiction of the Court on an *ad hoc* basis shall cooperate with the Court 'without any delay or exception in accordance with Part 9' (art. 12(3)). States may only challenge the admissibility of a case once and it must be made 'at the earliest opportunity' (arts. 19(4) & (5)). Unjustified delay can be indicative of an unwillingness to prosecute, leaving it open to the Court to intervene (art. 17(2)(b)).

[19] *Regina v. Askov*, [1990] 2 SCR 1199 at 1221.

[20] The Statute contains provisions facilitating the optimal degree of cooperation between the ICC and States Parties. See e.g. arts. 86, 89(1), 93(1), 97, 99(4), 57(3)(d). The Prosecutor also has limited direct investigative powers, see e.g. arts. 56, 99(4), 57(3)(d).

Effective prosecution as an interpretive principle requires that the Statute be read to avoid or minimize impediments, such as partiality, delay, and lack of State cooperation, to achieving a reliable verdict at trial.

### 2. *The Principle of Complementarity*

While the principle of complementarity was incorporated in the ILC's 1994 Draft Statute for an International Criminal Court (ILC Draft Statute),[21] its practical significance was eclipsed by that Statute's *ad hoc* consent preconditions to acquiring jurisdiction.[22] Under the ILC's draft, once the custodial and territorial States (and possibly a third extradition-requesting State) consented, it would be unlikely that another State would try to oust the ICC's jurisdiction by launching its own prosecution. During subsequent negotiations in the Preparatory Committee and at the Rome Conference, however, complementarity came to the forefront as attention turned towards compulsory jurisdiction for the most serious crimes. Compulsory jurisdiction appeared more acceptable if, under the principle of complementarity, the Court was required to defer to *bona fide* national prosecutions.[23]

Complementarity governs the relationship between the Court and States Parties and constitutes the means by which effective prosecution is accomplished. While it is sometimes said that the principle of complementarity gives national courts primacy in jurisdiction, this description is misleading. National courts may have the primary responsibility for prosecuting international crimes; they do not have primacy in determining where the prosecution will take place. Nor does the ICC have primacy in this respect. Under the ILC Draft Statute, States would effectively have had primacy because the Court's jurisdiction in a specific case depended on the *ad hoc* acceptance of jurisdiction by the relevant States Parties. The drafters also refused to follow the approach of the International Criminal Tribunal for the Former Yugoslavia (ICTY),

[21] Paragraph 3 of the preamble to the ILC Draft Statute, *supra* n. 11, provided that the court was 'intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective'.

[22] Under art. 21(1) of the ILC Draft Statute, id., the acquisition of jurisdiction in a particular case required both the custodial State (State which has custody of the accused) and the territorial State (territory on which the alleged crime occurred) to be parties to the Statute and, in a separate act, to have accepted the jurisdiction of the Court for that case. The consent of a third State, such as the State of nationality of the accused, was also necessary where that State requested the extradition of the accused pursuant to an international agreement (art. 21(2)). For further background on the ILC Draft Statute see James Crawford, *The ILC Adopts a Statute for an International Criminal Court*, 89 *Am. J. Int'l L.* 404 (1995).

[23] See *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995) paras. 91–101 [hereinafter Ad Hoc Committee Report].

which gives the ICC primacy.[24] Instead the drafters opted for a rule-based mechanism, which leaves the power to distribute prosecutions with a judicial organ of the ICC applying prescribed legal criteria.

The principle of complementarity is not just a procedural device for distributing prosecutions; it also reflects three substantive aims embodied in the Statute. When interpreting the Statute, these three aspects of complementarity should be kept in mind. The principle of complementarity is first and foremost a means for ensuring effective prosecution. Having national systems undertake the bulk of the prosecutions is efficient as it utilizes established resources and avoids overburdening the ICC.[25] Secondly, the principle reflects a sensitivity to various State sovereignty interests.[26] In the areas of surrender and evidence gathering, the Statute recognizes separate spheres of authority as between the Court and States and establishes a regime of cooperation to ensure the Court's effective operation. Lastly, the provisions on admissibility impose a minimum international standard of justice which States must maintain if they wish the Court to defer.[27] There are at least six elements to these standards.[28] The proceedings must be conducted in accordance with principles of due process recognized by international law. They can not be for the purpose of shielding the person from criminal responsibility. There can be no unjustified delay in the proceedings. The proceedings must be conducted independently and impartially. They must be consistent with an intent to bring the person concerned to justice. And

[24] See *Statute of the International Tribunal for the Former Yugoslavia*, SC Res. 827, U.N. SCOR, 48th Sess., Annex, 3217th mtg. at 29, UN Doc. S/RES/827 (1993), *reprinted in* 32 *ILM* 1203 (1993) [hereinafter ICTY Statute]. Article 9 of the ICTY Statute provides that the ICTY and national courts shall have concurrent jurisdiction, but the ICTY shall have primacy over national courts; it may request national courts to defer to its competence at any stage of the procedure. On the primacy of the international criminal tribunals, see generally *Prosecutor v. Tadic* (Jurisdiction), *supra* note 10 at 48–53; Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 *Yale J. Int'l L.* 383 (1998).

[25] This idea has been expressed on a number of occasions by members of the drafting bodies and other commentators. See generally Ad Hoc Committee Report, *supra* n. 23 at para. 31; *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Vol. I, UN GAOR, 51st Sess., Supp. No. 22, UN Doc. A/51/22 (1996) at para. 55 [hereinafter 1996 Committee Report]; Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 *Eur. J. Int'l L.* 144, 158 (1999); United Nations High Commissioner for Human Rights, *The High Commissioner's Position Paper on the Establishment of a Permanent International Criminal Court*, para. 62 (Geneva, 15 June 1998), which can be found at <www.unhchr.ch/html/menu2/2/icc.htm>.

[26] See, e.g., arts. 70(2), 72–3, 90(6), 93, 97–8.

[27] The drafting history reveals that an alternative approach, which required deference on demand without any review of the substantive quality of the national prosecution, was considered and rejected. See *Draft Statute for the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Addendum, Part One, UN Doc. A/CONF.183/2/Add.1 (14 April 1998), art. 15 [hereinafter Committee's Draft Statute].

[28] See arts. 17, 20(3).

finally, the justice system must have a certain capability to obtain the accused, the necessary evidence and to carry out its proceedings.

### 3. *Application of the Two Principles*

In applying these two principles in practice, there will be occasions when they conflict. If the principles cannot be reconciled it is suggested that the principle of complementarity should give way to that of effective prosecution, since the former principle is a means to achieving the latter. While the means (complementarity) may reflect other values, these must be subordinate to the prior value of effective prosecution. It cannot be assumed that the States Parties to the Statute would devise a mechanism to implement their collective purpose which, in its operation, undermined that same purpose.

## III. Procedural Impediment: Burden of Proof in Admissibility Challenges

### 1. *The Problem of Allocating the Burden of Proof in Admissibility Challenges*

Allocation of the burden of proof can be of considerable practical importance to the outcome of contentious disputes. Where the evidence is evenly balanced, the burden of proof may be used by the court as a legitimate legal basis to rule against the party having the burden.[29] This aspect of the burden of proof is closely associated with the distinct concept of duty to produce evidence, although the two are often confused and in civil law jurisdictions the distinction does not exist.[30] In a particular case, it is possible that the opposing parties will each have a duty to tender evidence to the court (an evidential duty), but only one party will have the ultimate burden of proof (persuasive burden).[31] Satisfaction of an evidential duty does not necessarily satisfy the persuasive burden, as this depends on the persuasiveness of the overall evidence. Different consequences also flow from the failure to meet these two types of obligations. Failing to discharge the persuasive burden means losing one's case, failing to discharge an evidential duty may have less drastic consequences, such as an adverse inference.

[29] See Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals*, 29–30 (1996); Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law*, 16–17 (1998).

[30] See Kazazi, ibid., at 21–38; Bernard Robertson, 'Exhaustion of Local Remedies in International Human Rights Litigation—The Burden of Proof Reconsidered', 39 *Int'l & Comp. LQ* 191 (1990); Kokott, *id.* at 9–17.

[31] Kazazi, ibid., at 35–8.

### 2. *The Procedural Structure Governing Admissibility*

#### *(a) Admissibility at the Investigative Stage*

Under the Statute, the Prosecutor initiates investigations *proprio motu* (art. 15) or as a result of referrals of situations by either States Parties or the Security Council acting under Chapter VII of the United Nations Charter (arts. 13–14). The Prosecutor must initiate referred investigations unless there is no reasonable basis to proceed having regard to the strength of the evidence, the admissibility of the case, and any substantial reasons to believe that an investigation would not serve the interests of justice (art. 53(1)).

Once a non-Security Council referred investigation has been initiated, the Prosecutor must notify all States Parties and those non-States Parties, which 'would normally exercise jurisdiction over the crimes concerned' (art. 18).[32] Within a month of receipt of this notice, a State may inform the Court that it is investigating or has investigated the criminal acts mentioned in the notification (art. 18(2)). 'At the request of that State, the Prosecutor shall defer to the State's investigation . . . unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation' (art. 18(2)). Although not expressly stated, the title of article 18, 'Preliminary rulings regarding admissibility', suggests that the Chamber is to decide this application in accordance with the admissibility criteria in article 17.[33]

It is unclear whether the requesting State may participate in the consideration of the Prosecutor's application. Article 18 neither refers to the process as a 'hearing' nor provides for the submission of information to the Court by any entities other than the Prosecutor. The Rules appear to prescribe a procedure whereby the Court will decide the Prosecutor's application on the basis of written submissions (rule 54). But rule 55(1) also provides that the Pre-Trial Chamber will have the authority to decide the procedure followed in each case and may hold a hearing if appropriate. Article 18(7) appears to contemplate a State being able to challenge a ruling of the Pre-Trial Chamber under this article. It provides that '[a] State which has challenged a ruling of the Pre-Trial Chamber under this article' has only a limited right to bring another challenge under article 19. It is unclear whether the first challenge

[32] This category of non-States Parties is limited to those that would 'normally' exercise jurisdiction, thereby obviating the need to determine if States under their domestic law would have actual jurisdiction in a particular case. The criteria obviously cannot be based on universal jurisdiction as this indiscriminate standard would be unworkable and require notification of all States. Presumably, the Prosecutor has been given the competence to define the criteria according to international law standards and the most common bases for exercising jurisdiction (e.g. territorial, nationality).

[33] This is consistent with rule 55(2), which provides that the Pre-Trial Chamber shall consider the factors in art. 17 in deciding whether to authorize an investigation.

referred to here is a challenge in the first instance during the consideration of the original application or a challenge as in the nature of an appeal. Paragraph 4 does not clarify the confusion. It simply provides that the State concerned or the Prosecutor 'may appeal' to the Appeals Chamber against a ruling of the Pre-Trial Chamber; the word 'challenge' is not repeated. Nevertheless, given the challenging State's obvious interest in the outcome of the application, the restriction on its ability to raise the issue again, and its express right of appeal, the most sensible construction is to presume that the State in question will have the opportunity to participate as a party to the original proceeding.

Even if it is decided to defer to a State's request, the Prosecutor may remain concerned with the domestic prosecution in three respects. First, the Prosecutor can review its deferral decision and re-apply for authorization after six months or at any time when there has been a significant change of circumstances in the State's unwillingness or inability genuinely to carry out the investigation (art. 18(3); rule 56). Secondly, the Prosecutor may request that the State periodically disclose the progress of its investigations and any subsequent prosecutions. States Parties must respond to such requests without undue delay (art. 18(5)). Finally, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence (art. 18(6)).

### *(b) Admissibility at the Surrender Stage*

At any time after the initiation of an investigation, the Prosecutor may apply to the Pre-Trial Chamber for the issuance of an arrest warrant (art. 58). The Pre-Trial Chamber must issue the warrant if satisfied on two conditions (art. 58(1)): (*a*) there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (*b*) the person's arrest is necessary to ensure attendance at trial, to ensure non-interference with the investigation or the court proceedings, or to prevent the commission of an offence.

On the basis of the warrant, the Court may transmit a request to any State, on the territory of which the requested person may be found, and request the cooperation of that State in the arrest and surrender of that person (arts. 58(5) and 89). States Parties must, 'in accordance with the provisions of [Part 9] and the procedure under their national law', comply with the request (art. 89(1)). However, requested States are entitled to object to the admissibility of the case and there are three different situations that might arise at this stage.

#### 1. PRELIMINARY RULING CHALLENGE

The requested State may have already received notification from the Prosecutor pursuant to the article 18 preliminary ruling mechanism. If the requested State makes a request for deferral within the one-month

deadline, any subsequent issues of admissibility will be dealt with in accordance with the article 18 procedure outlined above.

### II. RESTRICTED ARTICLE 19 CHALLENGE

If the requested State previously failed to secure a preliminary ruling of inadmissibility, it has only a restricted ability to bring a subsequent article 19 challenge at the surrender stage. The State may only bring this challenge on the 'grounds of additional significant facts or significant change of circumstances' (art. 18(7)). Aside from this restriction, the rest of the procedure to be followed is the same as the general article 19 challenge discussed below.

### III. ARTICLE 19 CHALLENGE

Article 19 sets out the normal procedure for States, accused persons and persons named in an arrest warrant or summons to challenge the jurisdiction of the Court and admissibility of a case. This type of challenge at the surrender stage will typically concern two groups of States: those which did not receive notification under article 18 and were thus not entitled to request the Prosecutor's deferral, and those which did receive such notification but chose not to request a deferral. Unlike the preliminary ruling mechanism, article 19 challenges are still available to States and individuals even if the situation has been referred to the Court by the Security Council.

Challenges to the admissibility of a case on the grounds referred to in article 17 may be made by

(a) an accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
(b) a State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
(c) a State from which acceptance of jurisdiction is required under article 12.[34]

If a State brings a challenge, the Prosecutor shall suspend the investigation until the Court rules on admissibility under article 17. However, pending the ruling the Prosecutor may seek authority from the Court to pursue necessary investigative steps to preserve evidence in exceptional circumstances, to take a statement or testimony from a witness or complete other evidence gathering that had previously been started, and to prevent the absconding of persons named in an arrest warrant (art. 19(7) and (8)).

[34] See art. 19(2). It appears from art. 12 that category (c) States include the territorial state and the state of nationality.

The admissibility of a case may be challenged under article 19 only once by any person or State. The challenge must take place prior to or at the commencement of the trial. Victims and those who may have referred the situation to the ICC are entitled to submit observations to the Court. The Statute does not expressly provide for a hearing, but as with the article 18 mechanism, the Rules provide that the Court shall decide on the procedure to be followed and may hold a hearing (rule 58). In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial (art. 19(4)). However, challenges at the commencement of a trial, or subsequently with the leave of the Court, can be based only on the principle of *ne bis in idem* under article 20(3).[35] In addition, States should make their challenges 'at the earliest opportunity' (art. 19(5)).

Decisions on admissibility may be appealed to the Appeals Chamber (art. 19(6)). Alternatively, if the Court has ruled a case to be inadmissible, the Prosecutor may submit a request for a review of the decision if new facts arise which negate the basis on which the case had previously been found inadmissible.

### *(c) Lack of Clarity in Allocation of the Burden of Proof*

In the absence of express direction, one may be tempted to infer the allocation of the evidential duty and persuasive burden from the language chosen by the drafters. For example, since admissibility is not a precondition to the exercise of jurisdiction, one might infer that whoever brings the application has the burden of proof. So in the case of the preliminary ruling, the Prosecutor would have the burden, while in the normal article 19 challenge, the party that brings the challenge (State or individual) would have the persuasive burden. However this formalistic approach to the issue is problematic, and as a proposed general rule of international law it has been the subject of much criticism.[36] Such an approach ignores both the substantive law in the particular case, and the ability of the parties to obtain the evidence required.

Perhaps a more refined approach is to consider the substantive legal criteria and to ask whether it appears to divide the persuasive burden between the parties on the basis of a general proposition subject to one or more enumerated exceptions. So for example, under article 17(1)(a) the State has the burden to show that it is prosecuting the case within

[35] See art. 19(4).

[36] See Kazazi, *supra* n. 29 at 225–8; Kokott, *supra* n. 29 at 174–6; Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol. II, 575–7 (1986); Case of Certain Norwegian Loans (*Fr. v. Nor.*), 1957 ICJ 9, 39 (6 July) (separate opinion of Judge Lauterpacht); C. F. Amerasinghe, *Local Remedies in International Law*, 278, 281–2 (1990).

jurisdiction, while the Prosecutor has the burden to show the inadequacy of that prosecution. This approach is akin to the *actori incumbit probatio* principle ('the burden of proof rests upon him who asserts the affirmative of a proposition that if not substantiated will result in a decision adverse to his contention'),[37] which some writers have characterized as a general rule of international law applied by international tribunals in inter-State disputes.[38] However the *actori* principle has also been criticized.[39] It seems arbitrary to allocate the burden on the basis of assertions of 'affirmative' propositions only. In litigation, parties will tend to assert all favourable propositions irrespective of whether they are framed in the affirmative or negative. In some instances, there may be reasons for wanting to impose a persuasive burden on a party to prove a negative proposition. For example, in criminal law, it is generally incumbent on the prosecutor not only to prove the elements of the crime but also to disprove any substantive defences raised by the accused. Since the *actori* principle does not allow for burdens to disprove propositions (i.e. prove negative propositions), it is of limited application. It also suffers from being abstract, overly formalistic, and divorced from the overall context and purposes of the Statute.

### 3. *Assistance from the Preparatory Work*

The preparatory work to the Statute is of limited assistance in resolving the present issue.[40] This is so for three reasons. First, the issue of burden allocation was not expressly addressed in any of the draft texts

[37] Durwand V. Sandifer, *Evidence Before International Tribunals*, 127 (*rev. ed.*, 1975).

[38] See generally Kazazi, *supra* n. 29 at 221–3; Dinah L. Shelton, *Judicial Review of State Action by International Courts*, 12 *Fordham Int'l LJ* 361, 379 (1989); H. W. A. Thirlway, *Evidence Before International Courts and Tribunals*, in *Encyclopedia of Public International Law*, vol. II, 302–4 (R. Bernhardt (ed.), 1992).

[39] Kokott, *supra* note 29 at 184–95; Kazazi, ibid., at 224–30.

[40] The preparatory work of the ICC begins with the work of the ILC in 1993–4, although there were earlier related discussions in the context of the Draft Code of Crimes Against the Peace and Security of Mankind. See *supra* n. 12. The 1994 Draft Statute was considered by an Ad Hoc Committee of the General Assembly, which prepared a report in 1995, see *supra* n. 23. Further work in drafting the Statute was continued by the Preparatory Committee (Committee), which held six formal sessions from 1996 to 1998. For a succinct summary of these sessions, see the four articles written by Christopher Keith Hall published in volumes 91 and 92 of the *Am. J. Int'l L.* at 177, 124, 331, 548 respectively (1997 and 1998). The negotiations at the Rome Conference were conducted in a number of separate working groups concerned with specific aspects of the Statute. However, given the importance of Part 2 of the Statute, dealing with jurisdiction and admissibility, negotiations on this part were held in the Committee of the Whole, in which all participating States were represented. The debates on admissibility in the Committee of the Whole can be found at *Summary Records of the 11th and 12th Meetings of the Committee of the Whole held on June 22–3, 1998*, UN Doc. A/CONF.183/C.1/SR.11 & SR.12. See also *Making of the Rome Statute*, *supra* n. 4, for a detailed account of the drafting history behind the Statute.

produced by the official bodies.[41] In the first two sessions of the Preparatory Committee in 1996, France had proposed an admissibility procedure that addressed the issue of evidential duty. In preliminary admissibility challenges, the State or person challenging would be required to provide information concerning the conduct of the investigations and the judicial procedures which might support a finding of inadmissibility.[42] However, this proposal was never discussed in the first two sessions, and it does not appear to have been mentioned again.[43] The second limitation of the preparatory work is the lack of any reported authoritative statements by States or members of the official bodies on the topic. While some non-governmental organizations recommended that States should generally carry the burden of proof, the issue does not appear to have been publicly debated amongst the delegates.[44] One reason is that much of the negotiations on the admissibility articles both in the Committee and at the Rome Conference occurred during informal sessions or other private meetings.[45] These sessions and meetings proved to be effective in identifying objections and securing agreement, but they were not officially reported. Lastly, the few public statements by States on the issue are conflicting and generally unhelpful in discerning any general opinion.[46]

[41] The 1994 ILC Draft Statute is generally recognized as the first draft Statute, although the ILC produced an earlier draft in 1993. See *supra* nn. 11 and 12. In the fourth session of the Committee, the predecessor to art. 17 was drafted in a form which came very close to the final article. See *Decisions Taken by the Preparatory Committee at its Session held in New York from 4 to 15 August 1997*, UN Doc. A/AC.249/1997/L.8/Rev.1, 1997, Annex I, art. 35. The predecessor to art. 19 was drafted in the fifth session of the Committee. See *Decisions Taken by the Preparatory Committee at its Session held in New York from 1 to 12 December 1997*, UN Doc. A/AC.249/1997/L.9/Rev.1, 1997, Annex III, art. 36 [hereinafter 5th Session Committee Report]. The preliminary ruling mechanism (art. 18) was introduced by the US in the last session of the Committee. See *Proposal Submitted by the United States of America*, UN Doc. A/AC. 249/1998/WG.3/DP.2 [hereinafter US Proposal]. All the articles drafted by the Committee were collected together in a Draft Statute, which served as the basis of negotiation at the Rome Conference. See Committee's Draft Statute, *supra* n. 27. During the drafting process at the Conference, there were two interim drafts of Part 2 prepared by the Bureau of the Committee of the Whole: see *Discussion Paper*, UN Doc. A/CONF.183/C.1/L.53 (6 July 1998) and *Bureau Proposal*, UN Doc. A/CONF.183/C.1/L.59 (9 July 1998).

[42] See art. 39 proposed by France in 1996 Committee Report, vol. II, *supra* n. 25.

[43] However, evidential duties in admissibility proceedings are addressed in the Rules. See *infra* note 62.

[44] See Human Rights Watch, *Justice in the Balance: Recommendations for an Independent and Effective International Criminal Court*, 75–6, 82–3 (1998); Amnesty International, *The International Criminal Court: Making the Right Choices* art. 16 (1998).

[45] See Hall, *supra* n. 40, vol. 92 at 125 (n. 6), 332 (n. 2), 549 (n. 5); Holmes, *supra* n. 4 at 52; Roy S. Lee, *Introduction: The Rome Conference and Its Contributions to International Law*, in *Making of the Rome Statute*, *supra* n. 4 at 21–3.

[46] For example, in the Ad Hoc Committee, the view was expressed that the burden of proving an exception to the exercise of national jurisdiction should be on the ICC. See Ad Hoc Committee Report, *supra* n. 23 at paras. 42 & 49. On the other hand, in the first two sessions of the Preparatory Committee, some delegates thought that if in all cases the Prosecutor had to prove that circumstances required the Court's intervention, the Court would be reduced to 'a mere residual institution, short of necessary status and independence'. See 1996 Committee Report, *supra* n. 25 at para. 157.

Despite these problems, it is worth mentioning one aspect of the drafting process which can shed light on the rationale and background to the article 18 preliminary ruling. The article in its original form was introduced by the United States at a fairly late stage in the drafting process, in the last session of the Committee.[47] The proposal came as a surprise to many of the delegates and, because of time constraints, did not receive any consideration or debate.[48] It was simply included in bracketed form for consideration at the Rome Conference. The US representative at the Conference claimed to have proposed the article . . .

after it had become clear in the discussions of the Preparatory Committee that there was a growing support for the concept of referrals of overall situations to the Court by the Security Council, a State Party, or the Prosecutor acting *proprio motu*. In line with the principle of complementarity, it would then seem necessary to provide for a procedure, at the outset of a referral, which would recognize the ability of national justice systems to investigate and prosecute the crimes concerned. Under the proposed article, the Prosecutor would be able to proceed immediately to conduct an independent investigation *if, in the face of a challenge by a national judicial system, the Prosecutor could persuade the judge to allow him to do so*.[49]

The article in its original form was controversial for a number of reasons. The proposal required the Prosecutor to notify the world of all its investigations; a right of appeal existed only for States and it gave States an unlimited right to challenge admissibility on a subsequent occasion. It was perceived by some States as seriously undermining the effectiveness of the ICC.

Notwithstanding these objections, the preliminary ruling mechanism in amended form was ultimately incorporated into the Statute and was seen as being 'intricately linked to the complementarity regime and the independent role of the Prosecutor'.[50] States were adamant that amendments be included to minimize any hindrance to the effective operation of the ICC.[51] However, there is no indication of any public objections by States to the U.S. representative's expressed understanding that the Prosecutor would have the burden of persuasion in preliminary ruling applications.

[47] See US Proposal, *supra* n. 41.

[48] See generally Holmes, *supra* n. 4 at 68–73; Hall, *supra* n. 40, vol. 92 at 552.

[49] See *Summary Records of 11th Meeting*, *supra* n. 40 at 6 (emphasis added). See also David J. Scheffer, *The United States and the International Criminal Court*, 93 *Am. J. Int'l L.* 12, 15 (1999).

[50] See Holmes, *supra* n. 4 at 73.

[51] Ibid. at 69–73.

### 4. *Analogy of the Local Remedies Rule*

The requirement of exhausting local remedies is recognized as a general rule of international law in diplomatic protection claims[52] and as an essential step in complaints procedures under multilateral human rights treaties.[53] As a rule of admissibility dealing with the 'sensible relationship between national and international courts',[54] one might be tempted to apply the law of local remedies by analogy to admissibility proceedings in the ICC. By analogy, the allocation of the burden of proof as between applicant and respondent in local remedies proceedings would be the same as between the Prosecutor and investigating State in the ICC context.

With the possible exception of the U.N. Human Rights Committee,[55] the practice of international tribunals has shown a tendency to apply what is known as a divided burdens approach to the local remedies rule. Under this approach, it is incumbent on the respondent State to raise the objection of failing to exhaust local remedies and demonstrate the existence of available domestic remedies. If this is satisfied then it falls upon the applicant to prove that the remedies in fact were exhausted, or are unavailable or ineffective in addressing the wrong alleged.[56]

Despite the apparent similarity in the two admissibility rules, there are a number a significant distinctions which caution against importing the law of local remedies into the ICC context. Arguments for imposing the

[52] See Case Concerning Elettronica Sicula S.p. A. (ELSI) (*USA* v. *Italy*), 1989 ICJ 15, 42 (July 20); Interhandel Case (*Switz.* v. *USA*), 1959 ICJ 6, 27 (21 Mar.); Ambatielos Claim (*Greece* v. *UK*), 23 ILR 306, 334–6 (Arb. Comm. 1956); Amerasinghe, *supra* n. 36; A. A. Cancado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (1983).

[53] See First Optional Protocol to the International Covenant on Civil and Political Rights, *adopted* 16 Dec., 1966, 999 UNTS 302, arts. 2, 5(2); American Convention on Human Rights, *adopted* 22 Nov. 1969, 1144 UNTS 123, arts. 46–8; Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 11 May, 1994, ETS No. 155, art. 35 (in force 1 Nov., 1998); Robertson, *supra* n. 30; Jo M. Pasqualucci, *Preliminary Objections Before the Inter-American Court of Human Rights: Legitimate Issues and Illegitimate Tactics*, 40 *Va. J. Int'l L.* 1 (1999); T. Zwart, *The Admissibility of Human Rights Petitions* (1994).

[54] Brownlie, *supra* n. 9 at 509.

[55] The Human Rights Committee appears to impose the burden entirely on the respondent State to demonstrate available and effective remedies. See generally *Ramirez* v. *Uruguay* (Comm. No. 1/74), UN Doc. A/35/40, 121, 123; *C.F. et al.* v. *Canada* (Comm. No. 113/81), UN Doc. A/40/40, 217 at paras. 6.2, 10.1; *Croes* v. *Netherlands* (Comm. No. 164/84), UN Doc. A/44/40, 259 at para. 10; *A. et al* v. *S.* (Comm. No. 1/76) in Selected Decisions under the Optional Protocol, UN Doc. CCPR/C/OP/1, 18; Amerasinghe, *supra* n. 36 at 297; Zwart, *supra* n. 53 at 11–13; but see *contra* P. R. Ghandhi, *The Human Rights Committee and the Right of Individual Communication*, 273–5 (1998) and Dominic McGoldrick, *The Human Rights Committee*, 188–9 (1994).

[56] For diplomatic protection cases, see generally *supra* n. 52. For human rights case, see generally *Austria* v. *Italy*, App. No. 788/60, 1961 Y.B. Eur.Conv. on HR 116, 168 (Eur. Comm'n on HR); *Donnelly* v. *United Kingdom*, App. Nos. 5577–83/72, Eur. Comm'n HR Dec. & Rep. 4, 64 (1975); *Gussenbauer* v. *Austria*, No. 4897/71, 1972 Y.B. Eur.Conv. on HR 448, 464–6 (Eur. Comm'n on HR); *X.* v. *United Kingdom*, App. No. 5006/71, 39 Coll. Dec. Eur. Comm'n on HR 91, 93 (1972); *X.* v. *United Kingdom*, App. No. 3651/68, 31 Coll. Dec. Eur. Comm'n on HR 72, 90 (1970); Velasquez Rodriguez Case, 4 IA. Ct. H.R. (ser. C) at para. 60 (1988); Adv. Op. OC–11/90, Exceptions to the Exhaustion of Domestic Remedies, 11 IA. Ct. H.R. (ser. A) at para. 41 (1990).

persuasive burden on the applicant in both diplomatic protection and human rights cases are not readily applicable to the Prosecutor. First, the analogy fails because the focus of the inquiry in local remedies proceedings is on the applicant's conduct, whereas in the ICC context it is on the State. In local remedies proceedings, the respondent State's claim of inadmissibility focuses on what the applicant could and ought to have done to exhaust local remedies. In the ICC context, a State's inadmissibility claim focuses on its own investigation and prosecution rather than on something the Prosecutor could or ought to have done. The issue is whether the claiming State has acted or is acting in such a manner as to be entitled to carry out the prosecution, and not whether there is anything further that the Prosecutor should do before the ICC can proceed.[57] As will be seen, appreciating that the State's claim of inadmissibility relates to its own conduct is central in understanding the allocation of the persuasive burden in admissibility proceedings under both articles 18 and 19.

Secondly, consistent with this difference in the focus of the inquiry, there is a distinction in the ability of the responding party to respond to the State's claim. In local remedies proceedings, given cost and accessibility reasons, applicants will normally have made attempts to obtain redress at the domestic level and thus are keenly aware of the effectiveness of these remedies. This is to be contrasted with the Prosecutor, who lacking resources and direct access will likely have little information about the state of the domestic prosecution.

Thirdly, there are differences in the consequences to the parties as a result of an admissibility decision. If a case is inadmissible under the local remedies rule, it is generally open to the applicant to exhaust the local remedy and, if necessary, return to the international forum without prejudice.[58] By contrast, where a case is ruled inadmissible in the ICC context, there is nothing further that the Prosecutor can practically do to make the case admissible at some point in the future. The only option available to the Prosecutor is to monitor the situation, with whatever means available, and to apply for a review if there is a change in circumstances.

Lastly, it is important to highlight the differences in the procedural context in which the rules operate. In diplomatic protection and human rights cases, there is only one application process governing the local remedies issue. As already discussed, the ICC by contrast has essentially

[57] Recall that even the principle of complementarity requires that States meet minimum standards of international justice before the ICC will defer. See text accompanying *supra* n. 28.

[58] See generally *C.F. et al.* v. *Canada*, *supra* n 55 at para. 71; *Aumeeruddy-Cziffra* v. *Mauritius* (Comm. No. 35/78), UN Doc. A/36/40, 135; *Jaona* v. *Madagascar* (Comm. No. 132/82), UN Doc A/40/40, 184.

two admissibility procedures, roughly corresponding to the investigation and surrender stages of a proceeding. These two procedures are not the same: rather they operate in tandem, and their structure as set out in the Statute has important implications for the allocation of the burden of proof. As will be discussed more fully in the next section, these implications arise primarily from a structure that promotes a dialogue between States and the Prosecutor over claims to investigate and prosecute. The effect of this dialogue is to induce certain expectations in the respective parties, which have implications for the allocation of the burden of proof.

### 5. *Application of the Interpretive Framework*

The allocation of the burden of proof will tend to disadvantage the party or parties on whom the burden lies. Naturally there must be a justification for this unequal treatment of the parties. For example, in criminal law, the presumption of innocence and the abhorrence of convicting the innocent are the reasons for imposing the burden of proof on the prosecution. In the context of ICC admissibility proceedings, it is argued that the reasons for burden allocation are derived from the internal logic of the Statute's procedural structure and from its underlying purposes. Applying this framework, it is submitted that the Prosecutor should have the persuasive burden of demonstrating admissibility in article 18 preliminary rulings. However, different considerations apply to article 19 challenges and lead to the opposite position that States (or individuals where appropriate) should have the persuasive burden of showing inadmissibility in these challenges. The proposal suggested here is meant to be applied flexibly, and there may be situations, discussed below, where fairness and the purposes of the Statute require a different allocation.

It is important to emphasize the internal logic of the procedural structure. The Statute formalizes what has been earlier described as a dialogue between States and the Prosecutor concerning the appropriate forum of prosecution. This dialogue begins with the Prosecutor's duty to notify States which would ordinarily have jurisdiction (whether or not they are Parties to the Statute) of an initial investigation into a situation. The notified States have a strict one month time limit to respond to the notice by requesting a deferral. A request for deferral made within time constitutes a public claim to undertake a *bona fide* national investigation and prosecution. Without knowing anything further about the intentions of the requesting State, there are no circumstances at this point to raise any doubt about the genuineness of the State's claim. Given that article

18 proceedings will normally be conducted during the early stages of the investigation, the concerns about delay will tend to be minimal. The principle of complementarity requires that the State be given the initial opportunity to investigate the situation. The same investigations would presumably have to be carried out, with or without State cooperation, even if the Prosecutor was authorized to proceed. Effective prosecution at this early stage requires that immediate investigatory steps be taken at the local level, unless it can be demonstrated by the Prosecutor that the requesting State clearly cannot or will not comply with its undertaking. This interpretation is largely consistent with the language of article 18 and the framers' intentions.

There will be a change in circumstances in two respects upon expiry of the one month deferral deadline. For notified States that did not choose to request a deferral, the implication is that they either did not have jurisdiction to prosecute or were otherwise not interested in doing so. In other words, there is implicit acquiescence on the part of these States in allowing the ICC to proceed. The other change in circumstance relates to the expectations of the Prosecutor. For the sake of certainty and effective prosecution, the Prosecutor must be able to rely on the absence of State claims for jurisdiction. On the basis of this reliance, the Prosecutor should confidently be able to invest time and effort into the investigation without fear of losing control over the case at the mere request of a State. It follows from these two circumstances combined with considerations of fairness that it should be more difficult for States to claim jurisdiction in article 19 challenges. These circumstances ground at least an inference of doubt about the genuineness of the State's claim to prosecute, although this inference may be rebutted.

This position is also supported by the two basic principles underlying the Statute. To halt the ICC proceeding with another proceeding that requires the Prosecutor to justify its continued investigation and prosecution presents an impediment which undermines the principle of effective prosecution. Resources dedicated to the criminal investigation might have to be diverted towards an admissibility investigation, which will involve acquiring information about the conditions of the national prosecution. Given that article 19 challenges can be brought at any time before trial, and in exceptional cases even after the trial commences, the concerns about detrimental effects of delay to the reliability of the prosecution are heightened. The Statute's requirement that these challenges be brought by States at the earliest opportunity highlights this concern. Imposing the persuasive burden on States also reinforces complementarity in that it creates an incentive for States to act diligently in the spirit of effective prosecution by using the article 18 preliminary ruling mechanism. This will lead to an efficient procedure that avoids delay, clarifies expectations over the appropriate forum at the outset of

the investigation, and minimizes overlapping investigations at both the national and international levels.[59]

One might object to the proposed allocation on the basis that it would be too easy for States to shield an accused by using the article 18 deferral mechanism. However, merely because the Prosecutor carries the persuasive burden under article 18, it does not follow that States have no evidentiary obligations to produce relevant evidence regarding its ability and willingness to prosecute. It is generally recognized in the practice of international tribunals that both parties will have evidentiary duties to assist the tribunal in its fact-finding role.[60] This is especially true for the party who has exclusive control over evidence that will shed the greatest light on the facts in issue.[61] To a certain extent, the Rules are consistent with this practice by imposing evidentiary duties on States to furnish the Court with information on its own prosecution in both article 18 and 19 proceedings.[62] However, the Rules are silent on the consequences of failing to discharge these duties. To reinforce their importance, detrimental consequences; short of losing the challenge, ought to follow upon their breach.[63] For example, if the State concerned refuses to provide evidence of its own investigation or an explanation of any apparent delay, then it should be permissible for the Pre-Trial Chamber to interpret this refusal as diminishing the strength of the State's rebuttal, or alternatively as strengthening the position of the Prosecutor. In addition to this evidential duty, the Pre-Trial Chamber may allow the Prosecutor some latitude in its means of proof when dealing with 'subjective facts', such as a State's intent to bring a person to justice, which would be very difficult to discern and would involve inquiries of a sensitive or even

[59] This dialogue between States and the ICC may be seen as an advantage over the present international criminal tribunals. The lack of an obligation on States to notify the ICTY or Rwanda tribunal of their own prosecutions has given rise to concerns about inefficient parallel investigations. See Frederik Harhoff,'Consonance or Rivalry? Calibrating the Efforts to Prosecute War Crimes in National and International Tribunals', 7 *Duke J. of Comp.& Int'l L.*, 571, 578–9 (1997).

[60] See arts. 64(6) & 69(3); Kazazi, *supra* n. 29 at 119–28; Kokott, *supra* n. 29 at 153–4, 188–91.

[61] See *Corfu Channel Case* (*UK* v. *Alb.*), 1949 ICJ 4, 18 (9 April) where the Court held that 'a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation . . . that State cannot evade such a request by limiting itself to a reply that it is ignorant . . . [t]he State may . . . be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal.'

[62] In requesting a deferral under art. 18, States must provide information concerning their own investigation, taking into account art. 18(2), to the Prosecutor, who in turn must forward this information to the Court if an application for authorization is made (rules 53–4). Where a State makes a challenge under art. 19, it must apply in writing and disclose the basis for the application (rule 58). Despite these apparent impositions of mandatory evidentiary duties, rule 51 creates confusion and ambiguity by suggesting that the State has a discretion to introduce evidence on its willingness to prosecute whenever the criteria in art. 17(2) is considered by the Court.

[63] See generally Fitzmaurice, *supra* n. 36 at 576–7; Kokott, *supra* n. 29 at 154, 188–9; Robertson, *supra* n. 30 at 192.

intrusive character.[64] Finally, it should be recalled that the fear of abusing article 18 was also of concern to the drafters; consequently, many safeguards were incorporated in the procedure to prevent abuse and to permit the ICC to monitor the situation.[65]

Should the analysis be any different when it is the accused or named suspect who is bringing the article 19 challenge? In this situation, one might think that the burden should always be on the Prosecutor because of the presumption of innocence or the accused's right 'not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal'.[66] To address this argument, it is first necessary to distinguish the *ne bis in idem* ground of inadmissibility from the other three grounds mentioned in article 17(1). The latter three grounds deal either with State sovereignty interests or an internal issue concerning threshold offence seriousness. They are not concerned with human rights. A decision on these grounds does not affect the jeopardy of the accused or advance the Prosecutor's material case. Consequently, the trial rights mentioned earlier are not intended to apply in this context. If the accused claims that there exists a State willing and able to prosecute, but that State has not joined in the proceeding, then this raises some doubt over the genuineness of the claim.[67] However, if the State has joined in the proceeding then the fact of the accused's participation does not make it any different than if the State alone was bringing the challenge. In both cases, the onus should be on the parties claiming inadmissibility; this is especially so if the Prosecutor has expended efforts in the investigation. But if the accused objects to admissibility on the *ne bis in idem* ground, then the Court will be asked to decide an issue which could advance the Prosecutor's case. The decision would effectively determine a substantive defence which the accused could raise at trial.[68] Unlike the other grounds, *ne bis in idem* brings to the foreground issues of fairness and human rights.[69] Furthermore, considerations of implied acquiescence and reliance by the Prosecutor do not strictly apply in this situation since the dialogue arising from article 18 does not involve individuals. Hence, in this situation it would be incumbent on the accused to adduce evidence

[64] In the *Corfu Channel Case*, *supra* n. 61, the Court held that the 'exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to [events on its territory]. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.'

[65] See text accompanying *supra* n. 51.

[66] Arts. 66 & 67(1)(i).

[67] Note that the Prosecutor's obligation to suspend an investigation only extends to challenges brought by States (art. 19(7)).

[68] Art. 20.

[69] Of the four grounds of inadmissibility in art. 17, this is the only one for which the Court may grant leave to bring a challenge post-trial or on multiple occasions.

to support a claim of *ne bis in idem*, but the burden of persuasion would lie with the Prosecutor to rebut this claim.

Another possible criticism of the proposal is to the assumption that non-States Parties which did not receive an article 18 notice acquiesced in leaving the prosecution to the ICC. It is conceded that if any State challenges admissibility within the one month deadline, under articles 18 or 19, there is no appreciable difference whether that State was notified by the Prosecutor or not. In both instances, if the State can show that it has jurisdiction over the case, the reasons for leaving the persuasive burden with the Prosecutor remain the same. However, if the non-State Party without notification brings an article 19 challenge after the one month period, there are still reasons for leaving the persuasive burden with this State (even though it is inaccurate to say that this State had acquiesced in the ICC's jurisdiction). In this situation, the considerations of effective prosecution and respect for the expended efforts of the Prosecutor in its investigation weigh in favour of imposing the burden on that State.

One final objection to the proposal might come from non-States Parties, who argue that the imposition of the persuasive burden on them is tantamount to imposing an obligation on third States and is excluded by the law of treaties. In replying to this complaint, it must first be recognized that the Statute creates a right of challenge for the non-State Party, which it might not otherwise have had. If the non-State Party wishes to exercise this right then it must agree to do so in the prescribed manner, with the attendant duties and obligations.[70]

## IV. Substantive Impediment: National Law Objections to Surrender

### 1. *The Problem of National Law Objections to Surrender*

Assuming a prosecution is admissible in the ICC, when, if ever, may a State Party validly refuse to comply with a request to surrender an accused person in its custody? Using extradition law as an analogy, there are three kinds of objections to a surrender request. First, States might argue that their domestic procedural requirements for arrest and surrender have not been met in the particular case. For example, there may be insufficient evidence of the criminal allegation to justify surrender, or, as in the case of Senator Pinochet, the accused may be found to be unfit

[70] See VCLT, *supra* n. 7 at art. 36.

to stand trial according to domestic standards.[71] Secondly, States might appeal to substantive grounds of refusal, which in some countries are contained in their constitutions, e.g. non-extradition of nationals.[72] Lastly, States and more likely the accused may object to the Court's failure to provide the same human rights and fair trial standards as the custodial State, e.g. the State constitution may prohibit life imprisonment,[73] or provide for a right to a jury trial, both of which the Statute lacks. If a custodial State makes this argument, the obvious reply is for that State to refer the matter to its competent authorities for prosecution. But if for whatever reason the custodial State cannot or will not prosecute, then the accused may argue that he should not be prejudiced by this circumstance beyond his control. To remove him to face trial in a forum guaranteeing a lesser standard of justice than his place of residence is unfair. Surrender should only be possible if the ICC provided the same degree of rights protection as in the custodial State.

It is important to disentangle two distinct issues embedded in these objections: (*a*) what norms, other than those in the admissibility criteria, can justify precluding the trial of an accused in the ICC; and (*b*) who should decide the applicability of these norms in a specific case? For example, it may be accepted that the accused's right not to be tried twice for the same offence must be protected, but it does not necessarily follow that the custodial State should be the body to give effect to this objection. As with the earlier issue of burden allocation, the Statute *prima facie* fails to answer these two questions. With respect to the traditional grounds for refusing extradition, such as double criminality, nationality, and political offence, the Statute neither expressly prohibits nor permits them. Without express provision, one might think that they are prohibited on the basis of the well-established principle that States cannot invoke their internal law as justification for failure to perform an international obligation.[74] But the Statute contains language which could conceivably

[71] The United Kingdom claimed that the legal basis for refusing to extradite Senator Pinochet to Spain because of his unfitness arose solely from a residual sovereign discretion granted by the domestic extradition legislation. The Secretary of State presumed that the European Convention on Extradition, to which the United Kingdom is a party, did not allow for refusal on the basis of unfitness. See paragraphs 28–31 of the Home Secretary's Letter to the Spanish Ambassador, reprinted in Home Secretary Jack Straw's written answer to question asked by Paul Clark, in UK, HC *Parliamentary Debates*, col. 358W (2 March 2000), which can also be found in Home Office Press Release No. 42/2000, *Senator Augusto Pinochet Ugarte*, at <wood.ccta.gov.uk/homeoffice/hopress.nsf>.

[72] See Helen Duffy & Jonathan Huston, 'Implementation of the ICC Statute: International Obligations and Constitutional Considerations', in *The Rome Statute and Domestic Legal Orders Volume I: General Aspects and Constitutional Issues*, 29, 43–4 (Claus Kress & Flavia Lattanzi (eds.), 2000) [hereinafter *The Rome Statute and Domestic Legal Orders*], where the many countries that have this constitutional prohibition are listed.

[73] e.g. Art. 34 of the Colombian constitution prohibits life imprisonment. See 'Political Constitution of Colombia', trans. by P. B. Heller & M. W. Coward, in *Constitutions of the Countries of the World* (Gisbert H. Flanz (ed.), 1995).

[74] See sources cited at *supra* n. 6.

support a contrary position. One thing that is clear from the Statute is that it does not follow the approach of the ICTY.[75] The ICTY Statute, under the authority of Chapter VII of the UN Charter, imposes an absolute duty on States to comply with requests to surrender accused to the Tribunal.[76] Rule 58 of the ICTY Rules of Procedure and Evidence expressly provides that the State's obligation to surrender prevails over any legal impediment which may exist under the national law or extradition treaties of the State concerned.[77] The Statute, on the other hand, adopts a compromise approach which some have described as exhibiting features of both a horizontal inter-State extradition model of cooperation, and a vertical supra-national model, such as the one used by the ICTY.[78] The precise scope of legitimate national law objections to surrender will have to be determined in the context of the Statute, its drafting history and underlying purposes.

### 2. *Substantive Framework Governing Surrender*

#### *(a) Basic Obligation to Surrender*

States Parties have a general duty to 'cooperate fully' with the Court in its investigation and prosecution (art. 86). Specifically, they must 'comply with requests for arrest and surrender' from the Court, 'in accordance with the provisions of [Part 9] and the procedure under their national law' (art. 89). States Parties have a further duty to ensure that there are procedures under their national law for the forms of cooperation required under Part 9 (art. 88). This is the basic duty to implement the Part 9 obligations.

What does the reference to 'procedure under . . . national law' encom-

[75] A proposal to expressly prohibit legal impediments was proposed by Croatia but not accepted at the Rome Conference. *See Proposal Submitted by Croatia*, UN Doc. A/CONF.183/C.1/WGIC/L.9 (29 June 1998).

[76] See art. 29(2)(e) of the ICTY Statute, *supra* n. 24.

[77] *Rules of Procedure and Evidence, adopted* 11 Feb., 1994, 33 ILM 484 (1994). Despite these seemingly coercive powers, the practice of the ICTY and ICTR has shown many incidences where States have imposed their national laws to impede the transfer of accused. This foreshadows problems for the ICC. See generally Sheila O'Shea, 'Interaction Between International Criminal Tribunals and National Legal Systems', 28 *NYU J. Int'l. L. & Pol.* 367 (1995–6); Kenneth S. Gallant, 'Securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition', in 'The Prosecution of International Crimes' 343–73 (R. S. Clark & M. Sann, eds., 1996); Kenneth J. Harris and Robert Kushen, 'Surrender of Fugitives to the War Crimes Tribunal for Yugoslavia and Rwanda: Squaring International Legal Obligations with the U.S. Constitution', 7 *Crim. L.F.* 561 (1996); Colin Warbrick, 'Co-operation with the International Criminal Tribunal for Yugoslavia', 45 *Int'l & Comp. LQ* 947 (1996); Hazel Fox, 'The Objections to Transfer of Criminal Jurisdiction to the UN Tribunal', 46 *Int'l & Comp. LQ* 434 (1997); Goran Sluiter, 'To Cooperate or not to Cooperate?: The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal', 11 *Leiden J. Int'l L.* 393 (1998).

[78] See Bert Swart and Goran Sluiter, *The International Criminal Court and International Criminal Co-operation*, in *Reflections on the ICC*, *supra* n. 5 at 97–101; *Prosecutor* v. *Blaskic* (Subpoena), *supra* n. 10 at 713–15; Cassese, *supra* n. 13 at 14–16; Cassese, *supra* n. 25 at 164–5.

pass? Are States given an unfettered discretion to define the national law which will apply to their arrest and surrender procedure? If so then will it be permissible to include all the traditional grounds for refusing extradition? Whether a national law is procedural in nature is not always easy to discern. For example, a constitutional prohibition against arbitrary arrests may be used to test the validity of the criminal process, but it is also a substantive right of the accused.

*(b) State Objections to Surrender*

State objections to surrender may arise from three possible sources in the Statute: the domestic arrest and surrender procedures, international obligations of the custodial State, and extradition refusal grounds applied by the custodial State.

I. DOMESTIC ARREST AND SURRENDER PROCEDURES

The Statute expressly provides that the arrest and surrender of an accused on the territory of a State Party is to be done in accordance with the domestic procedural laws of that State Party (arts. 59(1) & 89(1)). Article 59 appears to specify minimum requirements expected of domestic arrest proceedings. Upon arrest, the individual is to be brought promptly before the competent judicial authority in the custodial State which must determine three conditions: (a) the warrant applies to that person; (b) the person has been arrested in accordance with the proper process; and (c) the person's rights have been respected (art. 59(2)). The rights of persons during an investigation are specified in art. 55.

The individual also has the right to apply for judicial interim release pending surrender. While the decision to release is left to the national court, it can only be made after considering set criteria and recommendations from the Pre-Trial Chamber (art. 59(4) & (5)). One factor that the national courts cannot consider when deciding release is whether the warrant of arrest was properly issued under article 58, i.e. whether there were reasonable grounds to believe the person committed the offences and the arrest of the person appeared necessary.

The Statute contemplates the accused challenging surrender in the national courts on the basis of the principle of *ne bis in idem* (art. 89(2)). However, rather than considering the issue itself, national courts are required to defer the issue until the ICC has decided the admissibility of the case. As *ne bis in idem* is a possible ground of inadmissibility, this objection is effectively reserved for the ICC to determine prior to surrender.

II. CONFLICTING INTERNATIONAL OBLIGATIONS

Unlike the procedural limitations, the Statute clearly provides for objections where the duty to surrender conflicts with the State's other international obligations. Three specific areas are mentioned: competing

extradition requests,[79] State and diplomatic immunity,[80] and status of forces agreements.[81] The Statute contemplates that issues concerning competing requests will be resolved cooperatively with the Court prior to surrender. But with the other two areas, it is unclear where and when these issues should be decided.

It is also unclear whether a State Party can make legitimate objections beyond these three areas, for example in the area of human rights. The Statute expressly recognizes that breach of a pre-existing treaty obligation is a basis for early consultation with the ICC, but this does not necessarily justify or excuse non-compliance (art. 97).

### III. TRADITIONAL GROUNDS FOR REFUSING EXTRADITION

The rule of speciality is the only traditional extradition-based impediment that is expressly provided in the Statute (art. 101). The rule does not operate to prevent surrender but imposes a limit on the charges with which the ICC can proceed after surrender, subject to possible waiver by the requested State.

The other traditional extradition-based objections are neither expressly included nor excluded in the Statute. The Statute distinguishes 'surrender' from 'extradition' by providing separate definitions for each term (art. 102).[82] But for article 91, one might safely have thought that by failing to include these objections, the Statute intended their non-applicability. Oddly enough, the Statute appears to presume the possible existence of these objections in article 91, which is an article concerned with the documents the ICC must submit in support of a request for arrest and surrender. Paragraph 2 provides that the request shall contain (*a*) information to identify and locate the named person; (*b*) a copy of the warrant of arrest; and (*c*) such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, 'except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court'.

The practical effect of this provision is unclear. It appears to act as a

[79] Under art. 90(6) & (7), the requested State has a discretion whether to give effect to either the ICC request or a request from a non-State Party, with whom the requested State has an existing extradition agreement.

[80] See art. 98(1).

[81] See art. 98(2). The Statute does not actually use the term 'status of forces agreement'; rather, it uses the more general language of 'obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court'.

[82] For a discussion of this distinction, see William A. Schabas, 'Follow up to Rome: Preparing for Entry into Force of the International Criminal Court Statute', 20 *HRLJ* 157, 158 (1999); *The Rome Statute and Domestic Legal Orders*, *supra* n. 72.

constraint on the informational demands that a State can make of the ICC. However, to have this effect, it implicitly recognizes a State's authority to prescribe domestic law requirements for surrender, and expressly imposes an upper limit and caution on the exercise of this authority. This limit and caution on the State's authority is expressed only in exhortatory and not mandatory language. Are States permitted to include the traditional extradition refusal grounds as part of their domestic law requirements so long as they have deemed less burdensome requirements not 'possible' even taking into account the distinct nature of the Court? If this were so then a patchwork of different surrender regimes between the Court and States Parties might emerge. Is it possible that 'the requirements for the surrender process' refer not to all possible requirements but to a smaller subset of requirements, e.g. those that are only dependent on the receipt of information from the ICC for their verification? This approach would exclude refusal grounds such as nationality. Nevertheless, the meaning and effect of article 91(2)(c) is ambiguous; this ambiguity needs to be addressed by way of the interpretive framework. Before considering this issue from the perspective of the Statute's underlying purposes, an analysis of Part 9's drafting history can provide some guidance in understanding what was intended by article 91 (2) (c).

### 3. *The Drafting History*

It is helpful to view the drafting history of article 91(2)(c) in the context of the overall debate concerning whether to include extradition refusal grounds in the Statute. Like the Rome Statute, the ILC Draft Statute neither expressly prohibited nor permitted the invocation of such grounds.[83] The ILC also recognized that surrender or 'transfer' to the Court was to be distinguished from 'extradition' or other forms of surrender between two States.[84]

Two divergent views emerged in the Committee on how the surrender regime should be framed.[85] One view was that it should be broadly similar to that existing between States on the basis of extradition and legal assistance agreements. Under this approach, the framework of cooperation and the procedure by which each State meets its obligations would be largely controlled by its national law. The opposing view emphasized the unique nature of the Court's relationship to States, favouring the strict unimpeded transfer regime envisaged in the ILC

[83] This however was a natural consequence arising from the jurisdictional framework adopted in that Statute. Given that in all cases the custodial State had to accept the jurisdiction of the court, it was unlikely that the custodial State would accept jurisdiction and then try to impede the surrender of the accused.

[84] See commentary to art. 53 of the ILC Draft Statute, *supra* n. 11.

[85] See 1996 Committee Report, vol. I, *supra* n. 25, at paras. 310–25.

Draft Statute. Despite this divergence, there were two points on which there was general agreement. First, it was felt that the grounds for refusing compliance with requests from the Court should be limited to a minimum, and specifically laid down in the Statute, even though there was no agreement on what precise grounds for refusal should be included.[86] Secondly, there was general support for the view that the Statute should permit the involvement of national courts in the application of national law where those requirements were considered fundamental, especially to protect the rights of individuals, as well as to verify procedural legality.[87]

At its fifth session, the Committee drafted new provisions on surrender and cooperation[88] which were ultimately submitted for consideration at the Rome Conference.[89] Many of the provisions were bracketed, reflecting their tentative nature and the lack of consensus on them. With respect to the issue of grounds for refusing surrender two options were mentioned. The first simply stated that there would be no grounds for refusal. The second enumerated five refusal grounds, with an additional one mentioned in a footnote. These grounds provided for possible refusal if

- the State had not accepted the Court's jurisdiction in the particular case,
- the person is a national of the requested State,[90]
- the person is being investigated or prosecuted domestically,
- the information submitted does not meet the minimum evidentiary requirements of the requested State,
- compliance with the request would put the State in breach of an existing international obligation, or
- imposition of the punishment for the offence would be prohibited by the law of the requested State had it exercised jurisdiction.[91]

There was also a proposal by the Committee that the accused would be entitled to challenge surrender in the domestic courts on three bases: the lack of jurisdiction of the ICC, *ne bis in idem*, and failure to meet the evidentiary requirements of the requested State with respect to the factual allegations.[92] In the result the Statute only provides for domestic challenges on the basis of *ne bis in idem*, and even in this respect, the

[86] Ibid., at paras. 316, 324.

[87] Ibid., at para. 323.

[88] See *Report of the Working Group on International Cooperation and Judicial Assistance* in Annex IV of 5th Session Committee Report, *supra* n. 41.

[89] See Part 9 of the Committee's Draft Statute, *supra* n. 27 at 131–50.

[90] This ground was included in another set of brackets with an attached footnote, which contained the comment that this ground did not prevent the surrender to the Court so long as the person if convicted was returned to the requested State to serve the sentence. See n. 14 to art. 87 of Committee's Draft Statute, ibid., at 134.

[91] See n. 15 to art. 87 of Committee's Draft Statute, ibid. Footnote 13 to art. 87 provided that there was no agreement on the list of grounds contained in this option.

[92] See bracketed art. 97(7) of Committee's Draft Statute, ibid., at 136.

domestic court is to defer the issue until the ICC has determined admissibility.

While much of the same divergence in opinion persisted at the Rome Conference, by the end of the Conference, three significant achievements had been realized.[93] First, the qualification 'in accordance with . . . the procedure under . . . national law' was added to the duty to comply with surrender requests as a compromise for adding articles 88 (duty to implement cooperation obligations) and 97 (duty to consult with the Court).[94] It was understood that this qualification referred only to procedural laws and not the substantive laws of the State. Secondly, the term and concept of 'surrender' was favoured over that of 'extradition'. Lastly and most significantly, it was decided that there would be no enumerated grounds for refusing a surrender request.[95] The most controversial of the grounds for refusal that was removed was the one prohibiting the extradition of nationals. The majority view, even amongst many European countries which have such prohibitions in their constitutions, was that this limitation was inapplicable in the context of handing over persons to the Court. Eventually, the opposing States agreed to have their reservations about the deletion of this ground recorded in a footnote.[96] When this footnote was also deleted, nine States repeated their reservations in the Committee of the Whole.[97]

While it appears from this history that the drafters intended to remove all extradition refusal grounds from the Statute, it remains to be seen what was the intention behind article 91(2)(c). The predecessor to article 91 drafted by the Committee required the ICC in all cases to submit sufficient information to identify the person sought.[98] There were different additional submission requirements depending on whether it was a 'pre-indictment' arrest or a 'post-indictment' arrest.[99] In the former case, the request had to be supported by a copy of the arrest warrant, a statement of the reasons to believe the suspect may have committed a crime within the jurisdiction of the Court, a brief summary

[93] See generally Phakiso Mochochoko, 'International Cooperation and Judicial Assistance', in *Making of the Rome Statute*, *supra* n. 4 at 305–17.

[94] See *Report of the Working Group*, UN Doc. A/CONF.183/C.1/WGIC/L.11/Add.3 (13 July, 1998).

[95] See *Report of the Working Group*, UN Doc. A/CONF.183/C 1/WGIC/L.11/Add.4 (14 July, 1998).

[96] See Mochochoko, *supra* n 93; ibid.; *Report of the Working Group*, UN Doc. A/CONF 183/C.1/WGIC/L.11/Add.4 /Corr.1 (July 15, 1998). The footnote reads, '[s]ome states reserved their position with respect to the deletion of this provision as this would raise problems of compatibility with constitutional provisions and domestic legislation'.

[97] See *Summary Records of the 38th Plenary Meeting of the Committee of the Whole held on July 15, 1998*, UN Doc. A/CONF.183/C.1/SR.38 at 3–4.

[98] See art. 88 of the Committee's Draft Statute, *supra* n. 27 at 139.

[99] A subsequent proposal by Canada, which appeared to be accepted by the delegates, abolished the distinction between post- and pre-indictment requests and minimized the Court's duty to supply details of the factual allegations. See *Proposal Submitted by Canada*, UN Doc. A/CONF.183/C.1/WGIC/L.1 (25 June, 1998).

of the facts of the case, a statement as to why pre-indictment arrest is urgent and necessary, and

[such documents, statements, or other types of information regarding the commission of the offence and the person's role therein, which may be required by the laws of the requested State;] [however, in no event may the requested State's requirements be more burdensome than those applicable to requests for extradition pursuant to treaties with other States;][100]

In respect of post-indictment arrest requests, it was only necessary to submit a copy of the arrest warrant and information regarding the commission of the offence. It appears that this initial reference to burdensome State requirements was made in the context of the sufficiency of evidence requirement and was not intended to refer to all possible requirements. Further evidence supporting this narrow construction of the provision can be seen from the drafting history of the Rome Conference, which reveals that the present article 91 had already been settled before agreement was reached to eliminate all express grounds of refusal.[101] This implies that article 91 was not intended to preserve or resurrect extradition refusal grounds. If article 91(2)(c) was intended to recognize any domestic authority to refuse surrender, it was only limited to cases where the evidence supporting the commission of the offence was insufficient for surrender.[102]

### 4. *Application of the Interpretive Framework*

Historically, extradition treaties imposed reciprocal restraints on surrender not to protect the interests of the fugitive, but to ensure respect for the sovereign interests of States. These restraints have been described as

largely designed to serve the interests of the requested state rather than the individual. Many states prefer not to extradite political offenders as this will impair their neutrality towards internal conflicts in foreign states. The principle of *non bis in idem* is applied to ensure respect for the judicial decisions of the requested state; the double criminality requirement secures respect for the legal system of the requested state; and the rule of speciality protects the integrity of the extradition process.[103]

[100] See art. 88(1)(b)(v) of the Committee's Draft Statute, *supra* n. 27.

[101] See *Report of the Drafting Committee to the Committee of the Whole*, UN Doc. A/CONF.183/C.1/L.68 at 3, 5 (13 July 1998). This Report shows that the decision to remove the six enumerated refusal grounds was still pending while the final text of what would become art. 91 was already adopted.

[102] In describing the drafting history, Mochochoko notes that the express refusal ground of failing to meet the minimum evidential requirements of the requested State was removed and incorporated into art. 91. See *supra* n. 93 at 312.

[103] See Committee on Extradition & Human Rights (International Law Association), *First Report*, in *Report of the 66th Conference held in Buenos Aires* 142–183 at para. 7 (1994).

However, more recently there has been greater recognition of the requested person's human rights as legitimate considerations in extradition.[104]

The Statute defines a relationship between the Court and States Parties that is fundamentally different from the bilateral relationship between States arising from extradition treaties. There are at least three significant distinctions suggesting the diminished importance of sovereignty interests in the ICC context. The most obvious is that the ICC is not a State but an entity manifesting the will of all States Parties. It could be said that when dealing with the ICC, a State Party is dealing with an international organization, of which it forms a constituent part.[105] The relationship is not intended to be reciprocal as the ICC is an instrument of the States Parties designed to serve their interests in complementary effective prosecution. Secondly, the State–ICC relationship under the Statute is much more complex and broader than the State–State relationship in extradition treaties. In the latter case, States' rights and obligations generally start and end with the request and extradition of the individual. In the ICC, States Parties have many more rights, obligations and interests beyond the realm of surrender.[106] Lastly, in contrast to extradition treaties, the Statute provides for an extensive criminal procedure that aims to guarantee a fair trial and the due process rights of the accused. Concerns about sending one's national to face an uncertain trial in some alien jurisdiction are non-existent or significantly diminished in the ICC context.[107]

The unique relationship between States Parties and the ICC supports an interpretation favouring a strict and unimpeded surrender regime in the Statute. Further support for this interpretation can also be found in the Statute's underlying purposes. The Statute represents an agreement amongst States Parties to enforce laws prohibiting the worst international crimes, in accordance with principles of effective prosecution and complementarity. Assuming a case is admissible, the principle of effective prosecution favours an expeditious and unimpeded surrender to

[104] See generally Committee on Extradition & Human Rights (International Law Association), *First Report*, ibid., *Second Report*, in *Report of the 67th Conference held in Helsinki*, 214–46 (1996), and *Third Report*, in *Report of the 68th Conference held in Taipei*, 132–63 (1998); *Soering* v. *United Kingdom*, 161 Eur. Ct. HR (ser. A) (1989); Kai I. Rebane, 'Extradition and Individual Rights: The Need for an International Criminal Court to Safeguard Individual Rights', 19 *Fordham Int'l LJ* 1636 (1996); Christine Van den Wyngaert, 'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?', 39 *Int'l & Comp. LQ* 757 (1990); *Model Treaty on Extradition*, GA Res. 45/116, UN GAOR, 45th Sess., Annex, Agenda Item 100, at art. 3, UN Doc. A/RES/45/116 (1991).

[105] Under art. 112, every State Party is an equal member of the Assembly of States Parties, the Statute's overarching administrative body.

[106] e.g. the right to refer situations, challenge admissibility, participate in the selection of judges and the Prosecutor, challenge a decision not to prosecute a referred case, and obligations to provide judicial assistance and permit the Prosecutor to conduct on-site investigations in certain cases.

[107] See Duffy & Huston, *supra* n. 72 at 45, '[s]urrender to the Court does not entail the same degree of abandonment of one's own nationals as extradition might'.

the Court. Unless the Court is allowed to exercise jurisdiction, the accused will be free from prosecution. Effective prosecution can also be undermined by protracted domestic litigation over surrender. Delays will tend to jeopardize the truth-seeking function of the prosecution as witnesses tend to be more difficult to locate, and memories fade with time.[108]

Implicit in the principle of complementarity is the notion that States and the ICC have their respective spheres of competence. As States are responsible for executing arrest and surrender requests within their territory, it should be left to their courts to review the validity of that execution process. On the other hand, any issues relating to the conduct of the prosecution and trial should be left to be decided by the ICC after surrender. While the principle of complementarity involves some deference to state sovereignty interests, it should still be seen as a means to implement effective prosecution, not a substitute for such prosecution. Sensitivity to State interests should yield if the alternative to surrender is that the accused will go without prosecution. In other words, complementarity informs the question of whether the ICC or States should prosecute, but a prosecution there must be. Under Part 9, the Statute imposes obligations of 'ends' and leaves States to decide the 'means' to achieve them. The manner of implementation should be respected so long as the substance of the obligation is satisfied. Thus complementarity is best understood as affording a margin of appreciation to the manner in which States implement their Part 9 duties insofar as effective prosecution is not compromised, e.g. by creating undue delays or otherwise tainting the trial process.

Although the importance of sovereignty interests is diminished under the Statute, surrender remains a coercive process that uproots the accused and brings him or her before an international court, most likely located in another country. Such an interference with personal liberty must be justified at the earliest opportunity. In extradition law, this opportunity has generally been afforded to the sending State, irrespective of the safeguards in the receiving State. Human rights considerations require that there be some pre-surrender judicial determination of the validity of the arrest and the continued detention of the accused. The goal of the Court in achieving effective prosecution may conflict with these considerations. The challenge is to strike the most appropriate balance between the interests of the accused and the purposes of the ICC. For example, the interest in effective prosecution is not compelling if there is doubt that the arrested person is the person named in the arrest warrant. This kind of determination should be made at the earliest opportunity.

To complete the analysis in this part, the conclusions reached by

[108] See *Regina* v. *Askov*, *supra* n. 19 at 1220–2.

applying the interpretive framework will be summarized under four categories of possible objections.[109] Procedural objections are those derived from the processing of arrest and surrender requests in the custodial State. Substantive objections are those based on possible extradition refusal grounds in the Statute. Human rights objections are based on claims by the accused of human rights violations during both the investigative and trial process. The fourth category of objections concerns conflicting international obligations of the custodial State that impede or preclude compliance with a surrender request.

*(a) Procedural Objections*

As mentioned already, a State Party's duty to surrender a requested person is subject to two general qualifications: the provisions of Part 9 and national law procedures. In light of the distinct nature of the ICC, the drafting history of the Statute and the principles of complementarity and effective prosecution, national law procedures should not obstruct the surrender of accused persons to the Court. Variations from country to country in the procedural law may be respected so long as the delivery of the requested person to the court is not unreasonably delayed. As a general rule, States in implementing their Part 9 obligations should not introduce more procedural steps than are required by the Statute. States Parties are expected to act in good faith[110] and to consult promptly with the Court to resolve cooperation problems (art. 97).

The domestic procedures required by the Statute are minimal, consistent with ensuring an unimpeded and expeditious surrender to the Court. There must be procedures in place to receive and respond to arrest and surrender requests from the ICC. The Statute leaves it to States to apply their own domestic arrest law, but that law must respect the rights of a person during an investigation as set out in article 55. Upon arrest the person must be brought promptly before a judicial officer in the custodial State, who may grant the person interim release after considering the factors listed in article 59 (4) and the recommendations of the Pre-Trial Chamber. In deciding whether to grant interim release, the judicial officer is expressly prohibited from considering whether the warrant was properly issued. The arrested person is entitled to raise the issue of *ne bis in idem* in the national court; however, the issue is to be decided only by the ICC while the national court postpones the surrender proceeding.

[109] These categories do not purport to be watertight compartments. There is bound to be some overlap between them, especially since certain procedural and substantive objections, and conflicting international obligations, may have a human rights quality.

[110] On good faith in international law generally, see art. 26 of the VCLT, *supra* n. 7; *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 226 at paras. 98–103 (8 July); *Case Concerning the Gabčikovo–Nagymaros Project* (*Hungary* v. *Slovakia*), 1997 ICJ at paras. 141–2 (25 Sept.); Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 105–60 (1987).

Before ordering the person's surrender, the judicial officer must determine that the warrant applies to the person and that the person has been arrested in accordance with the proper process.[111] It is important not to confuse the first determination with the proof of an accused's identity at trial. Determining whether the warrant applies to the arrested person is a simpler issue and should not require any examination of the criminal allegations. If the reviewing judicial officer is not satisfied that the person named in the arrest warrant is the arrested person then that person should ordinarily be released.[112] A more interesting issue arises where the judicial officer finds that the 'proper process' has not been followed during the arrest procedures. Putting aside for the moment human rights considerations, it is difficult to accept that every procedural error should lead to the refusal of a surrender request. Most procedural breaches will likely be technical ones where the individual suffers little if any prejudice in making full answer and defence to the charges. Absent such prejudice, failing to surrender due to a procedural defect undermines the principle of effective prosecution and amounts to a failure to cooperate in breach of the Statute.

### *(b) Substantive Objections*

The text of Part 9, particularly its drafting history, and the purposes of the Statute reveal no basis for reading in the traditional extradition refusal grounds (except for the rule of speciality) or any residual discretion to refuse.[113] A wide interpretation of article 91(2)(c), which would open the door to these grounds, should not be accepted in light of its drafting history and the principle of complementary effective prosecution.

On the issue of whether States Parties may impose an evidential sufficiency requirement for surrender, the Statute is ambiguous. Two provisions expressly requiring the Court to consider evidential sufficiency were removed from an earlier draft and replaced with the more discretionary approach contained in article 91(2)(c).[114] The State's discretion to implement an evidential sufficiency requirement is limited by a duty of good faith. As expressed in article 91(2)(c), the requirement should be no more burdensome than existing requirements under

[111] Article 59(2) requires that a third determination be made, that the person's rights have been respected, but this will be discussed in the context of human rights objections.

[112] The Statute, however, does not expressly stipulate this. Instead, art. 97(b) simply lists this determination as an example of when the State Party must consult with the Court without delay in order to resolve the matter.

[113] State practice in implementing the Statute appears to be consistent with this position. See articles in *The Rome Statute and Domestic Legal Orders*, *supra* n. 72. For example, Canada's implementing legislation, Bill C-19: 'An Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other Acts', 2d Sess., 36th Parl., 2000 (assented to 29 June 2000, S.C. 2000, c.24), does not apply the traditional extradition refusal grounds.

[114] See arts. 87(3)(d) & 87(7)(c) of Committee's Draft Statute, *supra* n. 27.

extradition treaties for that State. Many countries, such as those parties to the European Convention on Extradition,[115] have no such sufficiency requirement and should not, in good faith, be permitted to impose one in the context of the ICC.

Finally, courts in the custodial State may be asked to address a substantive issue, having the potential to halt the prosecution, on the basis that the individual's detention should not be prolonged if the ICC would inevitably reach the same outcome at trial. An example of this is refusing to surrender on the basis of unfitness to stand trial (as in the case of Senator Pinochet).[116] Taken to its logical limit, this argument would allow States to rule on issues directly related to the accused's guilt or innocence, such as an alibi defence. The Statute clearly does not contemplate such an intrusive role for States.[117] Evidential sufficiency only concerns the question whether the prosecution has sufficient evidence to meet a threshold test (e.g. a *prima facie* case) and should not require the domestic court to weigh evidence or consider substantive defences. It is submitted that the need to respect the separate spheres of responsibility between the Court and States, the importance of maintaining uniform international trial standards, and the Statute's safeguards in favour of the individual all support the detention and surrender of the accused until the substantive issue can be decided by the ICC.

### *(c) Human Rights Objections*

It is important to distinguish human rights complaints impugning the conduct of the arrest and surrender procedures from complaints about the conduct or fairness of the accused's trial before the ICC. While the custodial State has been given limited jurisdiction over the first category of complaints, jurisdiction over the second category of complaints should rarely if ever be exercised by the custodial State.

#### I. RIGHTS DURING AN INVESTIGATION

The Statute requires the domestic court to determine that the arrested person's rights have been respected before ordering surrender. Article 55 provides for a number of procedural rights during an investigation, and in particular, during questioning by the Prosecutor or by national authorities. As with the requirement to determine 'proper process', the Statute gives no indication as to the consequences of finding that the

[115] European Convention on Extradition, 13 Dec. 1957, 359 UNTS 276; ETS No 24.

[116] See *supra* n. 71.

[117] Extradition judges in Canada have not been given such a wide scope of review. In *Argentina (Republic)* v. *Mellino*, [1987] 1 S.C.R. 536 at 553, the Supreme Court of Canada found that it 'would cripple the operation of our extradition arrangements if extradition judges were to arrogate the power to consider defences that should properly be raised at trial. How would we react to foreign courts exercising this kind of pre-emptive jurisdiction in relation to trials in this country? There are, as well, practical considerations such as the limited information available to an extradition judge and his jurisdictional inability to obtain it.'

person's rights have not been fully respected. The principle of effective prosecution implies that not every violation results in a refusal to surrender, especially since rights violation can vary greatly in severity. It must be remembered that a State's refusal to surrender, when no country is willing and able to prosecute, is equivalent to a judicial stay of proceeding, which is tantamount to an acquittal. To warrant such an outcome, the rights violation must be so egregious that it is not reasonably possible for the accused to be guaranteed a fair trial. Most rights violations do not rise to this level and can be remedied by something short of a stay of proceedings. For example, a breach of an individual's right to counsel upon arrest is generally only prejudicial if he or she consequently provides incriminating evidence. This violation might be remedied by excluding the evidence at trial without frustrating the principle of effective prosecution. Indeed, the Statute allows the Court to exclude evidence at trial if it was obtained in violation of the Statute or internationally recognized human rights (art. 69(7)).

While rights violations may be remedied by a stay of proceeding or exclusion of evidence, it is suggested that the judicial officer in a surrender proceeding should not be given the jurisdiction to order these two remedies. These remedies have significant ramifications for the trial, and accordingly its implications should be left for the ICC to decide after surrender. Without the capability of obtaining all the relevant evidence, domestic courts will often be in a difficult position to decide these issues pre-surrender.

If remedial issues for rights violation should generally be left to be decided post-surrender in the ICC, then one might ask why the custodial State should have any competence to consider such violations. It is conceivable that the custodial State may order non-trial related remedies short of releasing the individual or excluding evidence at trial, e.g. ordering damages for physical or mental harm. But more importantly, by allowing individuals to raise these issues in the domestic forum, an evidential record of the complaint may be created and used as the factual basis for an application in the ICC. The individual will likely benefit from this opportunity while memories are fresh and witnesses are more accessible. Additionally, one should not ignore the possibility of detainees filing human rights complaints against the custodial State in international fora. Where this occurs, the international human rights tribunal will require that the applicant exhaust local remedies or otherwise demonstrate that the remedies were unavailable or ineffective.[118]

A difficult issue arises when the individual raises a rights complaint which requires consideration of the merits of the allegations, such as a complaint of arbitrary detention.[119] There are a number of reasons why

[118] See discussion of local remedies rule in Part III, section 4.

[119] Art. 55(1)(d) provides for a person's right not to be subjected to arbitrary arrest or detention in respect of an investigation under the Statute.

national courts should defer determination of this issue to the ICC without exploring the factual underpinnings of the arrest warrant.[120] First, the Statute provides that in deciding an interim release application, the national court is not to consider whether the warrant of arrest was properly issued. The intent of this prohibition would be undermined if an accused could circumvent it by requiring the domestic court to go behind the warrant in a complaint about arbitrary detention. Secondly, States that do not have an evidential sufficiency requirement would nevertheless be forced to review the factual allegations in an arbitrary detention challenge. Such a result would undermine the Statute's aim to ensure the least burdensome means to surrender. Thirdly, the ICC is the more suitable forum to decide an issue of arbitrary detention. The Court would be better placed to apply definitions of international crimes to standardize the legal tests for verifying the legality of the individual's detention. Furthermore, it is only after surrender that the accused is entitled to full disclosure of the prosecution's evidence, which can be extremely helpful to the defence in preparing the complaint or in deciding whether to raise the issue. Finally, there are safeguards in the Statute which attempt to minimize the degree of impairment to the individual's liberty interest.[121]

### II. FAIR TRIAL RIGHTS

In the second category of human rights objections, the accused claims that the trial process in the ICC either falls below international human rights standards or is not as favourable as in the custodial State, e.g. failing to provide for a right to a jury trial. In both cases, the national court should refrain from hearing the complaint, leaving it to be decided as a trial issue in the ICC. The ICC is the more suitable forum to decide whether the trial standards in the Statute are inconsistent with international human rights law. An attack on trial standards is essentially a

[120] The Rules appear to be consistent with this position. Rule 117 provides that challenges to the arrest warrant's validity will be referred to the Pre-Trial Chamber while the arrested person is detained in the custodial state. The Pre-Trial Chamber is to decide the challenge without delay. The basis in the Statute for the Chamber to consider this challenge is unclear. The only express pre-surrender challenges to be considered by the Pre-Trial Chamber relate to admissibility where the arrested person raises the issue of *non bis in idem* in the national courts (see art. 89(2)). It could be that the Chamber's jurisdiction is implicitly found in a duty to ensure that the detainee's procedural rights under art. 55 are respected.

[121] The arrest warrant is issued by a judicial body of the Court only if satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and the arrest appears necessary (art. 58(1)). After the person is delivered to the Court, the Pre-Trial Chamber must satisfy itself that the accused has been informed of the alleged crimes, and of his or her rights under the Statute, including the right to apply for interim release (art. 60(1)). Within a reasonable time after surrender, the Pre-Trial Chamber must hold a hearing to confirm the charges on which the Prosecutor intends to seek trial (art. 61). Before the hearing, the accused is entitled to be informed of the charges and evidence on which the Prosecutor intends to rely. To have the charges confirmed, the Pre-Trial Chamber must be satisfied that there is sufficient evidence to 'establish substantial grounds to believe that the person committed each of the crimes charged'.

claim that the accused cannot realize a fair trial in the ICC. However, in most cases, a review of such a claim will require an appreciation of the facts and issues in the case, which is something that national courts will not be in a position to obtain. Furthermore, claims of trial unfairness can often be addressed by the court in the course of the trial. The Statute clearly requires the Court to protect the human rights of accused persons.'[122] In addition to protecting the specific 'minimum guarantees' listed in article 67, the Court has residual authority to 'ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused' (art. 64(2)).

Where the custodial State refuses to hear a complaint challenging the ICC trial standards, it will be open to the accused to bring a complaint before an international human rights tribunal, to which the custodial State is party. Assuming the tribunal decides the complaint before the person is surrendered, this scenario could lead to the interesting problem of the custodial State facing inconsistent demands from the ICC (ordering the accused's surrender) and the tribunal (finding that surrender would put the State in breach of its human rights treaty obligations). It is difficult to predict what exactly the Court would do in this case; however, there appear to be at least three options. The Court could defer to the tribunal's decision by reading the Statute's analogous human rights provision(s) in a consistent manner. Conversely, it could disagree with the tribunal's decision and make a finding of non-cooperation against the custodial State, which would then become a matter for the Assembly of States Parties (arts. 87(7) and 112). Alternatively, a solution to the problem could be found through consultations pursuant to article 97.

Claims that surrender should be refused because of more favourable trial standards in the custodial State are difficult to accept if the accused would consequently go without prosecution. In such cases, the question arises as to whether the custodial State would be in breach of the Statute if, instead of surrendering, it proceeded to prosecute the accused applying its more favourable trial standards. The answer depends on whether the circumstances of this prosecution fall below the international standards of justice set out in the Statute's admissibility criteria. Where the Court decides a case to be admissible, it effectively has held that there is no State 'willing and able' to carry out the prosecution. The principle of complementarity is concerned with minimum standards of justice and not with ensuring the most advantageous trial procedures for the accused. Thus, where the Court has made a determination that a particular case is admissible, the custodial State must surrender the

[122] The fair trial rights contained in arts. 55 and 67 parallel those found in the various international human rights treaties. The application and interpretation of the applicable law by the Court must be consistent with internationally recognized human rights, and be without adverse distinction on a number of enumerated grounds (art. 21(3)).

requested person irrespective of that person's wishes. Further support for this position can be seen by contrasting the surrender provisions with those governing other forms of cooperation set out in Part 9. In the latter case, the drafters included an exception to complying with an assistance request where execution of the request 'is prohibited in the requested State on the basis of an existing fundamental legal principle of general application'. The omission of this express exception for surrender requests suggests that States Parties must comply even if it means contravening a domestic law of fundamental significance.

*(d) Conflicting International Obligations*

Part 9 of the Statute permits three derogations from the basic duty to surrender where the requested State is required to act inconsistently with obligations under extradition treaties, principles of immunity, and status of forces agreements. It is perhaps too early to say what other conflicting international obligations will override a State Party's surrender obligations under the Statute, e.g. Chapter VII action under the UN Charter. Rather than suggest that there might be other categories of overriding conflicting international obligations, the Statute contemplates that when conflicting obligations arise they are to be resolved cooperatively on a case-by-case basis. Article 97 provides that where compliance with a request would require the requested State to breach a 'pre-existing treaty obligation', the requested State must consult with the Court without delay to try to resolve the matter. At the end of the consultations, it will be for the ICC to decide whether the requested State Party's position is in breach of the Statute.[123]

## V. Conclusion

This article has sought to apply the principle of purposive interpretation in clarifying ambiguities in the Statute's text. The principle of effective prosecution is the Court's *raison d'être*. To apply it in this context is appropriate: the criminal justice systems of States are themselves aimed at achieving reliable trial outcomes. Complementarity, on the other hand, is a new word in the international law lexicon. It is supposed to define the complex relationship between States and the ICC as set out in the Statute. To define complementarity as giving 'primacy' or 'priority' to States is to oversimplify the concept. As illustrated by the surrender issues discussed in this article, complementarity is a fluid concept that may emphasize or de-emphasize State interests depending

[123] This is to be contrasted with compliance problems with assistance requests (other than for surrender) prohibited by domestic law based on existing fundamental legal principles of general application. Art. 93(3) provides that if 'after consultations the matter cannot be resolved, the Court shall modify the request as necessary'.

on the nature of the problem. To understand how complementarity applies to a particular issue, it is necessary to identify the point where exclusive domestic jurisdiction ends and State obligation under the Statute begins. In some cases, the Statute makes it clear where this dividing point should be. For example, States must exhibit certain minimum standards of international justice before the ICC will refrain from prosecuting an otherwise admissible case. As well, obligations to cooperate with the ICC are subject to certain international obligations that a State may have. Where the dividing point is less clear, three guiding principles applied in this article are suggested. First, complementarity serves effective prosecution and must be subordinate to it. Secondly, the dialogue structure between States and the ICC sets reliance and expectation interests that affect the scope of State obligations. Thirdly, States and the ICC have separate spheres of authority based on their functional and legal expertise. In anticipation of many surrender issues and problems, these principles aim to provide durable solutions that balance the often conflicting interests of States, the ICC and accused persons.

*Conference on*
*International Criminal Justice*

# The Role of Victims and Survivors in the International Criminal Court

**Ilaria Bottigliero**

# The Role of Victims and Survivors in the International Criminal Court

by Ilaria Bottigliero

*Main points on the role of victims in the ICC*
*from a speech entitled "The Role of Victims and Survivors*
*in International Criminal Justice: From the ICTY and ICTR to the ICC", presented at the*

*Conference on International Criminal Justice*
*Jointly organized by*
*Faculty of Law, the University of Hong Kong*
*The Centre for Comparative and Public Law (CCPL), the University of Hong Kong*
*The Department of Justice, HKSAR*
*Hong Kong SAR, 6 March 2002*

Ilaria Bottigliero
Hong Kong SAR
6 March 2002

# The Role of Victims and Survivors in the International Criminal Court

The 1998 Rome Statute of the International Criminal Court provides for a rather innovative procedure in the administration of international criminal justice with respect to victims and survivors of genocide, war crimes, crimes against humanity, and eventually the crime of aggression.

The treatment of victims in the Rome Statute rests on three main pillars:

1. the role of victims in the proceedings of the ICC;
2. the right of victims to seek and obtain redress;
3. the creation of a victims and witnesses unit.

## 1. The role of victims in the proceedings of the ICC

Victims can provide the Prosecutor with information which can trigger an investigation on crimes within the jurisdiction of the Court. In fact, according to Art. 15 of the Rome Statute, the Prosecutor may initiate investigations on his or her own motion on the basis of information received on crimes within the jurisdiction of the Court.

Should the Prosecutor decide that there is a reasonable basis to proceed with an investigation, he or she shall request an authorization by the Pre-Trial Chamber. During the pre-trial review phase, victims may make representations in writing to the Pre-Trial Chamber. The Pre-Trial Chamber may also request further information from the Prosecutor and from victims who have made representations and, wherever appropriate, the Chamber may hold hearings.

## 2. The right of victims to seek and obtain redress

Where an individual has been found guilty of one of the crimes under the jurisdiction of the Court, Art. 75 of the Rome Statute provides that the Court, in its decision, may determine the scope and extent of damages, losses and injuries, suffered by victims. In its determination, the Court shall act on the basis of principles relating to reparations, including restitution, compensation and rehabilitation, to be established by the Court itself.

The Court may make a determination on the scope and extent of damages, losses and injuries, either on its own motion, or upon the request of victims. However, the system is set up to be triggered mainly upon the specific request of victims, therefore only in exceptional circumstances will the Court determine damages on its own initiative.

Following the determination of the scope and extent of any damage, loss or injury to victims, the Court can:

1) make an order for reparations *directly against the convicted person* specifying appropriate reparations to victims, including restitution, compensation and rehabilitation; or
2) where appropriate, order the award for reparations to be made *through the Trust Fund* which is established in Art. 79.

Art. 79 of the Rome Statute institutes the Trust Fund for the benefit of victims and their families. The Fund's sources of income will be money or other property collected through fines or forfeiture and transferred by the Court in the Trust Fund, and reparation awards against a convicted person ordered by the Court to be deposited therein. Most operational matters - including the definition of criteria for the management of the Trust Fund - are currently under discussion in the Preparatory Commission.

### 3. The creation of a Victims and Witnesses Unit

Art. 43(6) of the Rome Statute establishes a Victims and Witnesses Unit within the Registry. The role and functions of the Victims and Witnesses Unit are further explained in Subsection 2, Rules 16 to 19 of the Rules of Procedure and Evidence. The Victims and Witnesses Unit is intended to perform a number of essential functions in support of victims and witnesses. This will include helping victims and witnesses cope with the judicial process, providing protective measures and security arrangements, counselling witnesses and victims, and protecting their privacy, dignity, physical and psychological well-being and security, particularly where crimes involve sexual or gender violence.

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Ilaria Bottigliero
Hong Kong SAR
6 March 2002

**Press Release . Communiquéé de presse**
**(Exclusively for the use of the media. Not an official document)**

**OFFICE OF THE PROSECUTOR**

**BUREAU DU PROCUREUR**

The Hague, 24 November 2000
JL/P.I.S./542-e

**ADDRESS TO THE SECURITY COUNCIL BY CARLA DEL PONTE, PROSECUTOR OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA, TO THE UN SECURITY COUNCIL**

*Please find below the full text of the Prosecutor"s address to the UN Security Council on 21 November 2000 in New York:*

...

Nor should we forget the role of victims in the justice process. The voices of survivors and relatives of those killed are not sufficiently heard. Victims have almost no rights to participate in the trial process, despite the widespread acceptance nowadays that victims should be allowed to do so. And those remarks apply equally to the Yugoslav Tribunal, where the position of victims is no better, and where the accused have also amassed personal fortunes at the expense of their country and its citizens. I believe that the judges share my views in principle, but do not favour giving the Tribunal itself the task of compensating victims, preferring to create a Claims Commission or its equivalent. It is regrettable that the Tribunal"s statute makes no provision for victim participation during the trial, and makes only a minimum of provision for compensation and restitution to people whose lives have been destroyed. And yet my office is having considerable success in tracing and freezing large amounts of money in the personal accounts of the accused. Money that could very properly be applied by the courts to the compensation of the citizens who deserve it. We should therefore give victims the right to express themselves, and allow their voice to be heard during the proceedings. In the event of a conviction, that would then create a legal basis for the Judges to decide upon the confiscation of monies sequestrated from the accused. The money might also go towards defraying the costs of the prosecution. I would therefore respectfully suggest to the Council that present system falls short of delivering justice to the people of Rwanda and the former Yugoslavia, and I would invite you to give serious and urgent consideration to any change that would remove this lacuna in our process.

.....

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**Interview by Stéephanie Maupas**
**The Hague, June 9, 2000**

Interview with Carla del Ponte, chief prosecutor of the two international tribunals

# Compensating victims with guilty money

With just a few weeks to go before the plenary session for all the Arusha judges, chief prosecutor Carla del Ponte spoke to Diplomacie Judiciaire about her commitment to improving the law on the compensation of victims, and comments on various cases being heard before the ICTR.

D.J. : It is something of a novelty for the prosecution to start talking about victims. What new approach will you be taking ?

Carla del Ponte : The whole question of representing victims in this trial was missing when I arrived and still is to a certain degree. Yet, it"s clear that there are victims in a genocide, and certainly in Rwanda. When I went there myself, I travelled outside Kigali and met many victims, especially at Gitarama. The fact that they are not represented in this trial troubles me a lot. I feel that something is missing. Of course, the prosecutor"s role is to get defendants convicted, and that is his or her chief task. In the current system, there is little time and space left to plead in the favour of victims. I think we should take the lead from civil law here, where there is a complainant and a lawyer who represents him or her. I am very sensitive to this issue. A system of criminal law that does not take into account the victims of crimes is fundamentally lacking, because the crime committed has enormous repercussions, whatever the crime. I know this from experience, but also from observing what happens in our Swiss system, based on civil law.

More concretely ?

On June 26 the judges" assembly [plenary session] takes place. I"ll be proposing the use of Amicus Curiae [where a witness testifies neither in favour or against the witness, but rather to inform the judges on a particular problem] and will discuss with judges the idea of allowing victims to represent themselves through a lawyer in an Amicus Curae procedure. This is important. Survivors, the victims, are far better able to explain what happened in Rwanda. I"d go even further by saying that whenever a financial investigation takes place as part of a general investigation and we manage to freeze a defendant"s money, the judges ought to decide what happens to that money. For me, there is only one proper response: give it to the victims. Of course, the pain does not go away. But if you are a victim and receive financial support, especially in the difficult conditions that we know about in Rwanda, then that"s already a real bonus.
According to the law governing international tribunals, all compensation claims must be made to the national legal system, which is the only body apt to judge. But just think of a civil action taken in a country like Rwanda or anywhere else: it takes a long time and costs a lot of money. Changing things on this front is a tricky business, since it requires changing the legal statutes, which means that the decision is down to the Security Council. That said, I have to say that there is a loophole in the law which might allow us to make some headway on the question. There is a rule which states that it is up to the judges to rule ""on sentences and sanctions"". I"m going to use the concept of sanctions to argue that sentences means prison and sanctions is the confiscation of money that has been

sequestered. Let"s say I"m making an interpretation. We"re not quite there yet, but I"ve opened up the debate at least.

So, that means that victims find themselves face-to-face with a defendant such as Jean Bosco Barayagwiza, for example. During one of the trial hearings the judges asked you to observe and respect the principle of the presumption of innocence. Does that shock you ?

It is obvious that I have to respect the presumption of innocence. But when I issue an indictment after an investigation, I am ready to support the accusation and am convinced that the defendant is guilty. Of course, if I plead innocent, I am not fulfilling my job as a prosecutor. In the case you mentioned, either the judges got a bit carried away or I didn"t explain myself correctly. At the time, I was supporting the indictment to get the Barayagwiza trial going. So it was clear to me that Barayagwiza should be convicted. That was the message I wanted to give to the judges. But the presumption of innocence was still respected because as long as there is no sentence or judgement, he is presumed innocent. But I"m the prosecutor, after all, and convinced that he is guilty, otherwise I couldn"t support the indictment. So there! This does not prevent me from respecting the presumption of innocence, which is an essential principal. It"s the judges who judge. Respecting this principle also means showing them all the evidence you have gathered until the very last day of the trial. We must never forget that our task is to convince them. But evidently I"m there to support the indictment.

Your visit to Kigali took place at the same time as the official visit by president Moi [president of Kenya] Was this a coincidence ?

I didn"t bump into him at the time.....
But I am in the process of setting up visits to certain heads of African States. I"ll be going to two or three of them with arrest warrants and will be meeting with the presidents. My message to them will be, ""Mr President, you have certain people here I"m interested in....."" Let"s just say that I"m going to have a little trip.
But I have to add that, compared to the Tribunal for Former Yugoslavia, Arusha is much better placed to tackle problems of international cooperation. There really are no obstacles, either in relations between African or European nations.

Yes, but don"t you still have to come down hard on the heads of certain governments ?

No, it"s all about contacts, I keep in contact with people. You have to get about, explain things, keep the ties.

What about the Ndindiliyimana case, where the Belgian authorities had to carry out a second arrest a week after he was released by the investigating judge ?

I was surprised by his release. Even those representing Belgian justice were surprised. It can happen that national legislation is applied and sometimes the judges are not informed about international law. Sometimes this causes temporary problems.

What is the ICTR president Navanethem Pillay going to do with the memorandum on the attack against president Habyarimana ?

I must say I was also surprised that New York sent this document to the president of the tribunal. If information comes to light on a crime committed, it should be sent straight to the prosecution. That

said, I quite understand why the president sent it under seal. If she will be judging the case, she must not have seen the document beforehand. I asked the UN headquarters to send me the memo. I haven"t received it yet but I hope to soon. I"m also interested because I know that Judge Brugièère is leading the investigation. The attack on the president is not in my jurisdiction, not within my competence. But if the enquiry shows that the act was laying the ground for genocide, then I have full competence in the matter. We are agreed on that. Judge Brugièère is carrying out his investigation and if information is found to support the first assertion then I"ll take over the case. That"s the stage we"re at.

Is this a weapon to help you put pressure on Kigali ?

What kind of pressure are you referring to? I don"t put pressure on anyone, I try to do my job, that"s all!

Is it a weapon to help with your discussions with Kigali ?

I have started an investigation into the RPF [Rwandan Patriotic Front]. I also know that the Rwandan government has sentenced RPF soldiers. The first thing to do is to avoid investigating the same episodes. Secondly, we need to exchange information.

Even if the crimes allegedly committed by members of the RPF are unlikely to be qualified in the same way, i.e, as genocide, are there still some ""big fish""? Are you investigating particular individuals ?

You"re the one who is suggesting this, not me. You can read it in the press too. Up until now, all the evidence relates to episodes that took place outside of Kigali and that were carried out by soldiers. I read all the rest in the papers.

Your approach seems different to that taken until now. As soon as the prosecution began its investigations in 1995, there were names, people suspected, many of whom were cited in the press. Are you following in the same vein as then, going after the planners and the main executors ?

Yes, and in the same spirit as the first investigations. With the same idea of catching those responsible. Of course. Absolutely.

# *Conference on International Criminal Justice*

## Hong Kong and the ICC: The Way Forward

**Paul Harris**

# International Criminal Court

## Overview

In spite of the existence and proliferation of rules and laws defining and forbidding war crimes, crimes against humanity and genocide, along with various treaties and conventions, protocols and codicils, this century has seen the worst violence in the history of humankind.

In the past fifty years more than 250 conflicts have erupted around the world; more than 86 million civilians, mostly women and children, have died; and over 170 million people were stripped of their rights, their property and their dignity. Most of these victims have been simply forgotten and few perpetrators have been brought to justice, until now.

The need for a permanent criminal court to prosecute and punish those individuals committing the most serious crimes is of paramount importance.

## Background

It has been 50 years since the United Nations first recognized the need to establish an international criminal court, to prosecute crimes such as genocide. In resolution 260 of 9 December 1948, the General Assembly, *"Recognizing that at all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required"*, adopted *the Convention on the Prevention and Punishment of the Crime of Genocide. Article I* of that convention characterizes genocide as *"a crime under international law"*, and *Article VI* provides that persons charged with genocide *"shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction . . ."* In the same resolution, the General Assembly also invited the International Law Commission *"to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide . . ."*

Following the Commission's conclusion that the establishment of an international court to try persons charged with genocide or other crimes of similar gravity was both desirable and possible, the General Assembly established a committee to prepare proposals relating to the establishment of such a court. The committee prepared a draft statute in 1951 and a revised draft statute in 1953. The General Assembly, however, decided to postpone consideration of the draft statute pending the adoption of a definition of aggression.

Since that time, the question of the establishment of an international criminal court has been considered periodically. In December 1989, in response to a request by Trinidad and Tobago, the General Assembly asked the International Law Commission to resume work on an international criminal court with jurisdiction to include drug trafficking. Then, in 1993, the conflict in the former Yugoslavia erupted, and war crimes, crimes against humanity and genocide -- in the guise of "ethnic cleansing" -- once again commanded international attention. In an effort to bring an end to this widespread human suffering, the UN Security Council established the ad hoc International Criminal Tribunal for the Former Yugoslavia, to hold individuals accountable for those atrocities and, by so doing, deter similar crimes in the future.

Shortly thereafter, the International Law Commission successfully completed its work on the draft statute for an international criminal court and in 1994 submitted the draft statute to the General Assembly. To consider major substantive issues arising from that draft statute, the General Assembly established the Ad Hoc Committee on the Establishment of an International Criminal Court, which met twice in 1995. After the General Assembly had considered the Committee's report, it created the Preparatory Committee on the Establishment of an International Criminal Court to prepare a widely acceptable consolidated draft text for submission to a diplomatic conference. The Preparatory Committee, which met from 1996 to 1998, held its final session in March and April of 1998 and completed the drafting of the text.

At its fifty-second session, one hundred and sixty States participated in the General Assembly convened the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, held in Rome, Italy, from 15-17 July 1998, approving by an unrecorded vote of 120 in favor and 7 against, with 21 abstentions, a Statute to establish a permanent International Criminal Court.

Sixty States need to ratify the Statute for the Court to come into existence. As at 27 February 2002 52 states have ratified. The remaining 8 are expected this year.

**Ratification**

In accordance with its article 125, the Statute was opened for signature by all States in Rome at the Headquarters of the Food and Agriculture Organization of the United Nations on 17 July 1998. Thereafter, it was opened for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998, after which the Statute was opened for signature in New York, at United Nations Headquarters, **until 31 December 2000.**

**Can't domestic courts, or the International Court of Justice, deal with these cases?**

National courts will always have jurisdiction. Under the principle of "complementarity", the International Criminal Court will act only when national courts are unable or unwilling. Unfortunately, in some countries, in times of conflict or social and political collapse, there may be no courts capable of dealing properly with these types of crimes. It may also be that the Government in power is unwilling to prosecute its own citizens, especially if they are high-ranking. Since those who commit crimes under the Statute often cross borders. it is necessary for States to be able to cooperate to capture and punish them. The International Criminal Court would provide an option in such cases.

The International Court of Justice, the principal judicial organ of the United Nations, is designed to deal primarily with disputes between States, and as such has no jurisdiction over matters involving criminal acts by individuals.

**How will the Court be different from the ad hoc Tribunals for the Former Yugoslavia and Rwanda?**

These ad hoc Tribunals were not intended to address violations that occurred elsewhere or to prevent violations in the future.

The International Criminal Court will be a permanent institution not constrained by these time and place limitation, acting quickly than if an ad hoc tribunal had to be established. As a permanent entity its very existence will be a deterrent and will also encourage States to investigate and prosecute egregious crimes committed in their territories or by their nationals, for if they do not, the International Criminal Court can exercise its jurisdiction.

**Does the Court's Statute violate international law by giving the Court jurisdiction over national forces or members of peacekeeping missions?**

The Court's Statute does not violate any existing principle of treaty law, nor has it created any entitlements or legal obligations not already existing under international law.

**Why are States Parties allowed to withdraw from the treaty for up to seven years?**

The intent is to allow a State time to change its national laws or policy to conform to the provisions of the Statute.

**To whom is the Court accountable?**

The States Parties oversee the work of the Court and will provide management oversight regarding the administration of the Court to the President, the Prosecutor and the Registrar, decide on the budget for the Court, decide whether to alter the number of judges, and consider any questions relating to non-cooperation. The States Parties cannot

interfere with the judicial functions of the Court. Any disputes concerning the Court's judicial functions are to be settled by a decision of the Court itself.

**When and where will the Court be set up?**

The Statute of the Court will enter into force after 60 countries have ratified it. As of mid-May 1999, 3 countries have ratified the Statute and 82 have signed it, showing their intent to seek ratification, which usually requires the approval of the national legislature. The seat of the Court will be at The Hague, in the Netherlands, but it will be authorized to try cases in other venues when appropriate. Practical arrangements for the Court's operation, such as its Rules of Procedure and Evidence, are to be worked out by a Preparatory Commission to be held in New York in June 2000.

**What's to assure that trials before the Court will be fair?**

The Court's Statute establishes the highest international standards and guarantees of due process and fair trial. The 18 Judges must meet a number of criteria of outstanding professional competence as well as geographical and gender representation. They will be elected by the States Parties to the Court's Statute -- by no less than a two-thirds majority, and conversely, may be removed from office if he or she is found to have committed serious misconduct or a serious breach of his or her duties.

The Prosecutor will be elected by secret ballot by the States Parties and must meet stringent qualifications: The Prosecutor will not be allowed to participate in any case in which his or her impartiality may be doubted. Any question concerning disqualification will be decided by the Court's Appeals Chamber. The Assembly of States Parties has the power to remove the Prosecutor if he or she is found to have committed serious misconduct or a serious breach of duties.

**Who will decide which cases are brought before the Court?**

Cases can be referred to the Court by States. The Court's Prosecutor can also initiate an investigation into a crime that has come to his or her attention. In such cases, the Court could only exercise jurisdiction if the State in whose territory the crime was committed, or the State of the nationality of the accused, is party to the Statute. Cases can also be referred to the Court by the UN Security Council, acting under Chapter VII of the UN Charter. Because the Council's actions under Chapter VII are of a mandatory nature, the Court could exercise jurisdiction even when neither the State in whose territory the crimes have been committed nor the State of nationality of the accused is a Party.

**What crimes will the Court try?**

Crimes within the jurisdiction of the Court are genocide. war crimes and crimes against humanity, such as widespread or systematic extermination of civilians, enslavement, torture, rape, forced pregnancy, persecution on political, racial, ethnic or religious grounds, and enforced disappearances. The Court's Statute lists and defines all these crimes to avoid ambiguity, including crimes of sexual violence.

The Court's jurisdiction will not be retrospective.

**What about crimes of aggression, terrorism and drug trafficking?**

There was wide support in Rome for including aggression as a crime, but insufficient time to agree on a precise definition. As a result, the Statute provides that crimes of aggression can be prosecuted by the Court when the States Parties reach agreement at a review conference on the definition, elements and conditions under which the Court will exercise jurisdiction over this crime. Since the Statute states that any agreement must be consistent with the UN Charter, it would require prior determination by the Security Council of an act of aggression.

Although there was considerable interest in also including terrorism and drug crimes in the Court's mandate, countries could not agree in Rome on a definition of terrorism, and some countries felt investigation of drug offences would be beyond the Court's resources. They passed a consensus resolution recommending that States Parties consider inclusion of such crimes at a future review conference.

**What's to stop the Court from prosecuting criminals for political motivations?**

There are checks and balances built into the process. The Prosecutor cannot even start an investigation without permission from a pre-trial chamber of three judges. The suspect and the States concerned also have the right to challenge investigation by the Prosecutor. In addition, States and the accused can challenge the jurisdiction of the Court or the admissibility of the case at the trial stage. The Prosecutor is obligated to defer to States able and willing to pursue their own investigations. Moreover, the UN Security Council can request the Court to defer investigation or prosecution of a particular case for renewable one-year periods. These measures will ensure that cases are substantial and deserve investigation and prosecution by the Court.

**What happens if a criminal evades capture?**

Based on evidence presented by the Prosecutor, the pre-trial chamber can issue an international arrest warrant obligating all States party to the Court's Statute to arrest that individual. In cases referred to the Court by the Security Council under Chapter VII of the UN Charter, the Court would be able to request the Security Council to use those powers to compel cooperation.

Some countries are prevented by their laws from extraditing a war criminal to another country for prosecution. However, during the negotiations for the Court, many countries stated that their extradition laws would not prevent them from delivering a suspect to an international court. Other countries indicated they would change their laws.

**Can a citizen be prosecuted from a country that is not party to the agreement establishing the Court?**

Yes, provided the country where the alleged crimes occurred is a State Party or the UN Security Council refers the case to the Court. However, under the principle of complementarity, the Court will act only if the national court of the accused does not prosecute him or her.

**What are a State Party's obligations under the Statute?**

States party to the Statute are required to assist and cooperate fully with the Court in all stages of its work and to respect international standards regarding the rights of victims, suspects and accused in investigations, prosecutions and trials. If a State Party refuses to comply with a request to cooperate, the Assembly of States Parties or the Security Council may review the matter.

**Will victims be entitled to compensation?**

The Court will establish principles for reparations to victims, including restitution, compensation and rehabilitation. The Court is empowered to determine the scope and extent of any damage, loss and injury to victims, and to order a convicted person to make specific reparation. A Trust Fund may be established for the benefit of victims and their families. Sources for the Fund will include money and other property collected through fines and forfeiture imposed by the Court.

**What must still be done before the Court comes into operation?**

A Preparatory Commission has begin work, commencing early in 1999, preparing proposals for practical arrangements for the entry into force of the Statute -- once it is ratified by 60 States, and for the establishment of the Court. The Commission will take up such matters as elements of crimes, rules of procedure and evidence, and rules of the Court. The Commission will also be involved in making arrangements for the physical establishment of the Court. Participation in the Preparatory Commission is open to all States even those that have not signed the Statute. The Secretary-General is requested to provide to the Commission such necessary resources as it may require, subject to the approval of the General Assembly.

**Additional Information:**

The United Nations:
http://www.un.org/icc

NGO Coalition for an International Criminal Court (CICC):
http://www.iccnow.org